Petition

81-716

No.

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Supreme Court of the United States

October Term, 1981

AMERICAN FEDERATION OF TELEVISION AND RADIO ARTISTS, CLEVELAND LOCAL, AFL-CIO,
Petitioner,

vs.

STORER BROADCASTING COMPANY,
Respondent.

PETITION FOR WRIT OF CERTIORARI
To the United States Court of Appeals
For the Sixth Circuit

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QUESTION PRESENTED

Whether the Court of Appeals' decision herein, conflicting with another Court of Appeals' decision on whether an arbitrator exceeded the scope of the submission, demonstrates the need for this Court to provide a fuller explanation of the lines of demarcation set forth in *Enterprise*,[1] particularly since this Court of Appeals also upheld an untried issue with no evidentiary support in the record, in conflict with its own decisions, and further upheld a substantial variation of a provision of the collective bargaining agreement.

LIST OF THE PARTIES

The two (2) parties to the proceeding are named in the caption.

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1. *United Steelworkers of America v. Enterprise Wheel & Car Corporation*, 363 U.S. 593 (1960).

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I. THE DECISIONS BELOW

The Opinion and Order of the United States Court of Appeals for the Sixth Circuit reversing the judgment of District Court is reproduced in the Appendix.[2]

The Opinion and Order of the United States District Court for the Northern District of Ohio, Eastern Division, granting the Plaintiff's (Petitioner's) Motion for Summary Judgment and remanding the case to the arbitrator to make a ruling on the issue of whether the grievant was discharged for "just cause" is reproduced in the Appendix (A4).

The Award and Opinion of the Arbitrator is reproduced in the Appendix (A20).

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2. The Appendix is attached hereto and paginated A1, et seq. The Court of Appeals' decision is at A1.

II. JURISDICTION

The judgment of the Court of Appeals was filed on July 20, 1981. The jurisdiction of this Court is invoked pursuant to 28 U.S.C. §1254(1).

III. STATUTORY PROVISIONS INVOLVED

This case involves Section 301 of the Labor Management Relations Act, 29 U.S.C. §185, and the Federal Arbitration Act, 9 U.S.C. §9, §10, §11, and §12 (See A72 and A70 respectively).

IV. STATEMENT OF THE CASE

A. Proceedings Before the Arbitrator

Respondent, Storer Broadcasting Company, is an Ohio corporation that owns and operates radio and television stations, including Television Station WJKW-TV in Cleveland, Ohio.

Storer and Petitioner, American Federation of Television and Radio Artists (AFTRA), a labor union, have been under various collective bargaining agreements covering certain employees of this station including reporters in the news room for some years. The agreement's grievance and arbitration provisions include a three (3) step procedure for resolution of employment disputes and if a dispute is not resolved in the first or second steps, it may, upon written request of either party, be submitted to arbitration.

Storer's News Director, on May 27, 1977, informed Jim Cox, a reporter employed in the news room of the station

for some ten (10) years, that he intended to discharge him. When Cox asked if he could resign and still receive severance and termination benefits, he was told he could. Cox said he would prepare a letter of resignation. After a change of mind over the weekend and a withdrawal of his offer to resign, Cox was discharged by News Director Dominic on May 30, 1977 (from undisputed findings of District Court, A6). Cox immediately filed a grievance through the AFTRA procedure and was represented by AFTRA in all stages of the grievance procedure and in the court proceedings since that time.

Storer's June 21, 1977 payroll notice listed the reason for grievant's termination as "just and sufficient cause pursuant to Section 24-B of Storer/AFTRA contract." On May 21, the News Director wrote Cox concerning his discharge and gave the reason as "just and sufficient cause pursuant to Section 24-B" (from undisputed findings of District Court, A6). This section reads as follows:

> *Reason for Termination.* The Company may terminate employment for insubordination, incompetence, misconduct or any other just and sufficient cause, and unsuitability[3] for staff or program requirements.

The grievance was arbitrated by David Ralph Hertz. Counsel for Storer, in his opening statement, said, "The

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3. Termination for "unsuitability for staff or program requirements" requires compliance with paragraph 24-G of the Storer/AFTRA contract. This Section reads:

> G. On termination for unsuitability, the Company will give consideration to all the capabilities of the Artist terminated in an endeavor to place such Artist in any other position in or out of the unit, in this station and in all other Storer stations and, if suitable employment is still not found, to do everything possible to obtain the Artist suitable employment at other radio and television stations. The Company will use its best efforts in this regard, but this clause shall not be subject to grievance or arbitration.

termination of the grievant was the culmination of a long history of transgressions" (Tr. 69).[4] AFTRA Counsel then said without contradiction, "Certainly it is a disciplinary discharge. There is no doubt about that" (Tr. 74). The entire three (3) day hearing before the arbitrator was on the issue of whether or not Cox was discharged for "just and sufficient cause." Then post hearing briefs were filed by both parties and were on the same specific issue.

The Company in its thirty-six (36) page post hearing brief stated the issue as follows:

"ISSUE"

> Was the grievant properly terminated by the Company ". . . for incompetence, misconduct, or any other just and sufficient cause. . ." under the "Management Rights" reserved to it under the terms and provisions of the collective bargaining agreement between the Company and the Union.

Then in its brief, Storer listed the following headings:

A. *Resignation vs. Discharge* 27

B. *Cox Termination Was For Misconduct* 28

C. *Cox Had Ample Warning Of The Consequence Of His Continued Misconduct* 32

D. *Nothing In Cox' Past Record Suggests Propriety Of Lesser Penalty* 33

E. *Absent Evidence Of Arbitrary Or Capricious Conduct On The Part Of The Company The Arbitrator Should Not Substitute His Judgment For That Of The Company* 34

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4. "Tr." refers to the pages in the Appendix in the Court of Appeals transcript.

Nowhere in the brief did Storer even mention the "unsuitability" clause. Nor did the Union. The Union, in its post hearing brief, listed the issue as follows:

"III. THE ISSUE

Whether the discharge of grievant, Cox, was for just cause, and if not, what discipline, if any, should be assessed?"

The Union argument also was limited to that sole issue.

The case was then ready for decision. Nevertheless, the arbiter then sent a letter to each counsel asking for "comments concerning the relevancy, if any, of the language" in 24-B "unsuitability for staff or program requirements." Counsel for AFTRA and the individual counsel for the grievant who had participated in the three (3) day hearing, and Storer's counsel answered the letter. AFTRA and the individual counsel advised the arbitrator that there was no relevancy whatever to that clause and it was not an issue in the case and AFTRA counsel quoted paragraph 24-G (footnote 3, page 4 herein) to point out that "unsuitability" has no application in a disciplinary discharge. Counsel for Storer wrote, "As the arbitrator knows, the Company *did not* specifically rely upon that ground [unsuitability] in terminating the employment of Mr. Cox" (Emphasis added). However, then he took advantage of the opening and said "unsuitability" could be used for a "lesser type of discipline," upon which there was no proof in the record at all.

Then the arbitrator, on May 22, 1978, issued his Opinion and Award (A22) and held grievant was discharged for "unsuitability", despite the News Director testifying that when grievant asked whether he would recommend him for "any kind of a television news job", the News Director

testified that, "I told him I could not do that in all good conscience. I thought that it would be hypocritical of me to be firing him on the one hand, and recommending him to another news director on the other hand" (Tr. 78).

Yet the arbiter held that the News Director "clearly had in mind the 'unsuitability' clause in discharging him."

The arbitrator, having decided the case on the wrong issue, then proceeded to completely alter the meaning of the termination clause. As stated, it read as follows:

> The Company may terminate employment for insubordination, incompetence, misconduct, or any other just and sufficient cause, and unsuitability for staff or program requirements.

The arbitrator held (A29):

> The language added [unsuitability] is significant in giving meaning to 'insubordination, incompetency, misconduct or any other just and sufficient cause'. It suggests that trifling insubordination, minor incompetency, venial misconduct in themselves do not warrant the extreme penalty of termination, but that they and 'other just or sufficient cause' may be considered in assessing the extent of appropriate disciplinary action when related to 'unsuitability' for the Employer's requirements.

This changes the termination clause to read as follows: (*Added* words to the text of the contract are in brackets. *Subtracted* words from the text of the contract are in brackets and are printed in italics in the body of the sentence.)

> The Company may terminate employment for [trifling] insubordination, [minor] incompetency, [venial] misconduct,
>
> [and]
> [*or any*] other just and sufficient cause
>
> [may be considered in assessing the extent of appropriate disciplinary action when related to]
> [*and*] unsuitability
>
> [for the Employer's requirements].
> [*for staff and program requirements*].

This finding was made despite the Storer/AFTRA contract provision (Section 10 *Arbitration* [c]), "The arbitrator shall not add to, subtract from, or vary the terms of this agreement."

B. Proceedings Before the Courts

Complaint was filed to vacate or modify the arbitration award in the United States District Court under Section 301 of the Labor Management Relations Act, 29 U.S.C. 185 (A72) and the Federal Arbitration Act, 9 U.S.C. §9, §10, §11, and §12 (A70) for the reason that the arbitrator had exceeded the submission to him which was whether or not the grievant had been properly terminated for incompetence, misconduct or any other just and sufficient cause and that there was not any evidence in the record that he had been terminated for unsuitability, and

by his ruling the arbitrator substantially altered the termination clause and thus created his own brand of industrial justice.

On March 4, 1980, on cross motions by Petitioner and Respondent for summary judgment, the Court granted AFTRA's motion, with a scholarly opinion holding that "unsuitability" as a ground for termination of the grievant was not advanced by either of the parties and there was no evidence in the record on unsuitability and that the arbitrator's decision was contrary to the principles established in this Court's decision in *Enterprise, supra,* and certain decisions of the Sixth Circuit Court of Appeals, and that "unsuitability" situations were intended to be differentiated in the provision on termination and treated separately from just cause and the arbitrator had no evidence in the record to support his finding that the News Director "clearly had in mind" unsuitability in discharging Cox[5]; therefore his decision was not rationally deduced from the collective bargaining agreement.

The arbitrator had no evidence before him on the meaning of "unsuitability" in the frame of the termination clause because that was not an issue in the case. But as stated, the District Court had decisions before it of other arbiters construing this very contract clause

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5. The District Court found on this point as follows (A19):

> As seen, Arbitrator Hertz concluded that "the News Director clearly had in mind not merely the Brook Park incident, but also the Grievant's 'suitability' for the employer's requirements." Occurring in the same time frame as the discharge of Jim Cox, the termination of Jim Hale reveals that when news director Dominic has the unsuitability clause "in mind" in terminating an employee, he knows how to use that section. He did not use it in discharging Cox. Hence, the arbitrator's suggestion that news director Dominic had the "unsuitability" clause "in mind" in the Cox case, is gratuitous and unsupported.

and who held that "unsuitability for staff and program requirements"[6] was meant to be for non-disciplinary terminations and the Court, after reviewing those decisions, said (A18):

> In sum, as Arbitrator Charles L. Mullin, Jr., stated in WIXY/AFTRA Arbitration Award of October 30, 1975 [A45], "unsuitability for staff and program requirements is not in essence a disciplinary concept." Therefore, "unsuitability" requires something different than a showing of an employee's professional incompetence or his inability to do a particular job. If this were not so, then the "unsuitability" clause could be used as a substitute for section 24B's requirement that the employment termination be for "incompetence, misconduct or any other just or sufficient cause." Then the "unsuitability" clause could thereby be applied subjectively by an employer to weed out a particular employee just because in the sole judgment of the employer that employee is "unsuitable." Rather, as Arbitrator Perry ruled, adopting Storer's position, [in a prior arbitration on a termination for "unsuitability for staff and program requirements"] the "unsuitability clause" applies where a "new format" has been established (either in program or staff requirements) and the employer decides in good faith that the "grievant did not fit anywhere into its new scheme."

The Court further held as to this same arbiter:

> As previously made clear by Arbitrator David Ralph Hertz in *WFMJ Broadcasting Co.*, [52 L.A. 995, 1969], the "unsuitability" clause is not to be read in sup-

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6. Not as Arbitrator Hertz said, "for the Employer's requirements."

port of the "just and sufficient cause" but is applied, "despite the absence of cause for discharge." In short, as a ground for termination, the "unsuitability" clause must be applied independently of the "just and sufficient cause" ground.

In the *Jim Hale* arbitration [A65], with Arbitrator Perry's approval, Storer asserted the established meaning of the "unsuitability" clause, relying on Arbitrator Hertz' ruling in *WFMJ Broadcasting Co., supra.* That established meaning is the plain and unambiguous meaning of the "unsuitability" clause which Arbitrator Hertz was "without authority to disregard or modify" in this case, *Detroit Coil v. I.A.M. & A.W., Lodge No. 82,* [594 F.2d 575 (1979), cert. den. 102 L.R.R.M. 2360]. Thus it was wholly inappropriate on the present record for the arbitrator to rely on the "unsuitability" clause as a basis for his ruling.

In the footnote, the Court said (A20):

> Thus, arbitrator Hertz's decision is not "rationally deduced from the agreement." *Timken Co. v. Local Union No. 1123, United Steelworkers of America,* 482 F.2d 1012, 1015 (6th Cir. 1973).

The Court then found:

> Nonetheless, it was the arbitrator's responsibility to rule directly upon the issue, framed by the parties, as previously defined. Did the evidence support the employer's discharge of Jim Cox for "just and sufficient cause"? More particularly, did the evidence support his discharge for "incompetence, misconduct, or any other just or sufficient cause"? The case is remanded to the arbitrator to make a ruling on that relevant and controlling issue.

This decision was then appealed by Storer to the Court of Appeals for the Sixth Circuit which rendered its decision on July 20, 1981. The Court of Appeals, saying it was a "very close case," reversed the District Court and said that, "The ambiguous language of this contract does not however leave us with the conviction that the arbitrator went outside the bounds of permissible construction of 'ambiguous contract language.'"

From that decision, Petitioner requests a writ of certiorari.

V. REASONS FOR GRANTING THE WRIT

A. The Enterprise Decision

Enterprise was one of the 1960 trilogy on industrial arbitration[7] setting forth the principles binding courts in the handling of arbitral matters arising out of collective bargaining agreements between unions and employers.

On the issue of exceeding the scope of the submission, this Court was content to rule that, "It is not apparent that [the arbitrator] went beyond the submission." However, this was soon accepted as a direction, the Fourth Circuit in *Textile Workers Union of America v. American Thread Co.*, 291 F.2d 894 (1961), saying (after citing the trilogy):

> In these cases, the court reaffirmed the long established doctrine that an arbitration award is unenforceable if it exceeds the scope of the submission, although where it is not "apparent that he [the arbitrator] went beyond the submission," courts should enforce the promise to arbitrate.

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7. *United Steelworkers of America v. Warrior & Gulf Navigation Co.*, 363 U.S. 574; *United Steelworkers of America v. American Manufacturing Co.*, 363 U.S. 564; *United Steelworkers of America v. Enterprise Wheel & Car Corporation*, 363 U.S. 593.

In *Enterprise*, this Court further delineated the arbitrator's obligations and duties, saying:

> An arbitrator is confined to interpretation and application of the collective bargaining agreement; he does not sit to dispense his own brand of industrial justice. He may, of course, look for guidance from many sources, yet his award is legitimate only so long as it draws its essence from the collective bargaining agreement. When the arbitrator's words manifest an infidelity to this obligation, courts have no choice but to refuse enforcement of the award.

In the case *sub judice*, after citing *Enterprise*, the Court of Appeals violated all these principles; first, by upholding an arbitration award that exceeded the submission; second, by upholding the arbitrator's finding on an issue not before him without any evidentiary support in the record on that issue; and third, by upholding the substantial change of the meaning of the termination clause in the collective bargaining agreement in violation of a specific ban in the agreement on doing that.

B. Exceeding the Scope of the Submission

This decision of the Court of Appeals is directly in conflict with a decision of the Court of Appeals for the Third Circuit in *Amalgamated Food & Allied Workers Union, Local 56, et al. v. Great Atlantic & Pacific Tea Company, et al.*, 415 F.2d 185 (1966). That Court of Appeals had almost identical facts before it, where an arbitrator refused to decide the issue before him. There, a board of three arbitrators, one appointed by the union, one by the company, and the third as impartial chairman of the board, heard a case where, as here, the sole issue before the arbitrators was just cause, arising out of whether the grievant took property

without paying for it from the store in which he was employed, and the union stated that was not just cause for the discharge in view of the employee's thirty-two (32) years with the company. The arbitration board could not come to agreement on the issue, and in the majority opinion it was made clear that the arbitrators did not consider the issue as to whether the grievant had committed a theft, deciding that one of the union letters to the employer waived that position. The majority of the board just confined itself to whether the penalty was too severe. The district court in an action instituted by the union to set aside the award stated:

> The obvious issues then are whether the arbitrators exceeded the scope of their authority under the contract and whether the decision of the arbitrators on the issue of the submission was so unreasonable as to amount to a denial of due process.

The Court further said:

> In the present case it is my opinion that the arbitrators' decision as to the scope of the submission was in violation of the terms of the collective bargaining agreement and that the decision reached is so unreasonable as to amount to a lack of due process.
>
> The only issue which could be arbitrated under the terms of the agreement, was 'just cause' or 'sufficient cause' for the discharge. For the arbitrators to conclude that this issue had been conceded in advance by the union necessarily meant that there was nothing for them to arbitrate. Such a conclusion goes far beyond the realm of defining the submission.
>
> Moreover I find it rationally impossible to square the documentary evidence with the result reached; the

alleged concession by the union simply cannot be deduced from the language of the written submission or the preceding notice.

From the record as a whole it would seem that the arbitrators have merely declined to arbitrate the issue submitted, because of difficulty in arriving at a decision on the merits. The award cannot be permitted to stand. The controversy will be referred back to the arbitrators for decision.

Then on appeal, the Court of Appeals said, "We are of the opinion that the record in the instant case fully sustains [the District Court's] disposition." It then cites the trilogy to say that the merits of the arbitration award may not be reviewed by a court, but said that, "In the instant case the merits of the 'just discharge' of Sichik, viz., his innocence or guilt, were not even considered by the Arbitration Board in its disputed award and its error in that respect is within the scope of judicial review of an arbitrator's award."

The decision of the Court of Appeals in the instant case is in direct conflict with this decision of the Third Circuit on the obligation to keep the arbitrator within the scope of the submission required by *Enterprise*.

Without arbiters being required to stay within the issues submitted to them, the parties to the collective bargaining agreement are being forced to arbitrate what they did not agree to arbitrate, in violation of the first principle of arbitration set forth in the trilogy, that "a party cannot be required to submit to arbitration any dispute which he has not agreed so to submit", *United Steelworkers of America v. Warrior & Gulf Navigation Co., supra*.

C. No Evidentiary Support in the Record

In *Enterprise*, this Court said "[the arbitrator] may of course look for guidance from many sources . . . ." Here the arbitrator took the clause "unsuitability for staff or program requirements" and without any evidence in the record decided it was applicable.

In upholding the arbitrator and rejecting AFTRA's argument on the issue, the Court of Appeals became in conflict with decisions of its own; one, even between the same parties hereto—*Storer Broadcasting Co. v. AFTRA*, 600 F.2d 45 (1979), where it upset an arbiter's award for making a factual finding "with no evidentiary support in the record." And in other cases, it upset the arbitrator's award for the same deficiency; *Timken Co. v. Local Union No. 1123, United Steelworkers of America, supra*, where the arbiter with no evidence supporting his award held that unauthorized absenteeism was not a mandatory reason for discharge; and in *Detroit Coil Co. v. I.A.M. & A.W., Lodge No. 82, supra*, where the arbitrator, without any evidence of prior practice or otherwise waiving a contractual statute of limitations, nevertheless ignored it, the Court saying:

> Although a court is precluded from overturning an award for errors in the determination of factual issues, 'nevertheless if an examination of the record before the arbitrator reveals no support whatever for his determinations his award must be vacated.'

Yet the Court did the opposite herein, ignoring the fact that the parties introduced no evidence in the record on the meaning of the "unsuitability" clause because it was not an issue in the case. And there was evidence to be submitted if that were the issue in the matter. The District Court considered three (3) arbitration de-

cisions where unsuitability was the issue, all of which held that unsuitability obviously was for non-disciplinary termination.[8]

This Court of Appeals' decision upholding an arbitral award with no evidence considered on the issue the arbiter decided, becomes precedent for allowing arbitrators to run wild and forge their "own brand of industrial justice" in direct violation of *Enterprise*.

D. Varying the Terms of the Contract

In *Enterprise*, this Court said:

> Nevertheless, an arbitrator is confined to interpretation and application of the collective bargaining agreement; he does not sit to dispense his own brand of industrial justice.

However, here, and of utmost importance, the arbitrator in effect wrote a new termination clause substantially changing it in violation of the specific prohibition not to "add to, subtract from or vary the terms" of the collective bargaining agreement. The Sixth Circuit has been adamant in upsetting awards where it decided an arbitrator had violated the terms of a contract; *International Brotherhood of Firemen & Oilers, Local 935-B v. Nestle Co.*, 630 F.2d 474 (1980), where the arbiter failed to find insubordination was sufficient grounds for discharge contrary to the contract; *General Drivers, etc. v. Hays*

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8. The *Jim Hale* case (incidentally between Storer and AFTRA) (A55) where the unsuitability was that the station format was changed to appeal to a younger audience the station wanted to influence; the *WIXY* case (A45) was a termination for unsuitability because of a drop in grievant's ratings and again where the station had changed the format to influence a different age audience; in *WHK* (A32), that unsuitability was the basis of grievant no longer projecting the image which the company wanted projected.

and Nicoulin, Inc., ... F.2d ....., 100 L.R.R.M. 2998 (1979), where the arbiter substituted his decision on an employee's health in place of the employer's; *Amanda Bent Bolt Co. v. U.A.W.*, 451 F.2d 1277 (1971), where the arbiter disregarded the no strike clause that deprived strikers of seniority.

Yet in the case *sub judice*, the same court disregards the fact that the arbitrator changed the entire meaning of the termination provision to make it deprive the union members of the right *not* to be discharged except for "just and sufficient cause." As the District Court said (A18):

> Therefore, "unsuitability" requires something different than a showing of an employee's professional incompetence or his inability to do a particular job. If this were not so, then the "unsuitability" clause could be used as a substitute for section 24B's requirement that the employment termination be for "incompetence, misconduct or any other just or sufficient cause." Then the "unsuitability" clause could thereby be applied subjectively by an employer to weed out a particular employee just because in the sole judgment of the employer that employee is "unsuitable."

AFTRA and other unions have fought hard and long for protection against unjustifiable discharges, so that their members may have fair job security and without which the union itself has no protection. Relief from such consequences is the strength of and need for the principles of the trilogy, where in the concurring opinion, the three (3) justices point out how the contracting out clause in *Warrior*, as ruled by the courts below based on "inconclusive evidence" would have allowed all the unit's work to be contracted out, thus allowing freedom to the company to destroy the collective bargaining agreement—so here,

if the arbiter can "interpret" the termination provision to uphold a discharge without "just and sufficient" cause, the company is able to discharge any and all employees in the unit at will.

E. Summary

Here, the Court of Appeals and the District Court squarely clashed on the principles set forth in *Enterprise*. The District Court held, "It was the arbitrator's responsibility to rule directly upon the issue, framed by the parties, as previously defined. Did the evidence support the employer's discharge of Jim Cox for 'just and sufficient cause?' "

The Court of Appeals ruled, "The ambiguous language of the contract does not, however, leave us with the conviction that the arbitrator went outside the bounds of permissible construction of 'ambiguous contract language.' "

Yet the Court of Appeals, with the record of the District Court before it showing evidence that the arbitrator did not have before him any proof on the meaning of the unsuitability clause, ruled the entire termination provision was "ambiguous." It was not and the arbiter's ruling was beyond the submission, without proof, and varied the contractual terms, all in violation of this Court's rulings and conflicting with its own and other courts of appeals' decisions.

VI. CONCLUSION

The differentiating principles set forth in *Enterprise* in 1960 seemed clear that interpretation of an ambiguous contractual clause is the arbiter's job; that dispensing his own brand of justice is not.

But now, the word "interpretation" covers the vital faults decried in *Enterprise* and blurs the distinction between what is allowable and what is not, and levels this watershed decision of this Court to a plateau where there is now authority that arbitral awards become sacrosanct on being labeled "interpretations."

This was not the meaning of *Enterprise* and this Court's further explication of those principles is needed (see *Amalgamated Assoc. of Street Electric Railway Motor Coach Employees v. Lockridge*, 403 U.S. 274 (1971), either by direction to the Court of Appeals to reverse its decision and uphold the decision of the District Court or by further delineating or explaining the necessity of lower courts to bring into focus the principles here involved so that obfuscation by "interpretation" ceases.

Accordingly, Petitioner requests that a Writ of Certiorari be allowed and this Court review the judgment of the Court of Appeals and reverse its decision and affirm the District Court's granting of Plaintiff's Motion for Summary Judgment.

Respectfully submitted,

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APPENDIX

DECISION OF THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

(Decided and Filed July 20, 1981)

No. 80-3307

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

AMERICAN FEDERATION OF TELEVISION AND RADIO ARTISTS, CLEVELAND LOCAL, AFL-CIO, *et al.*,
Plaintiff-Appellee,

VS.

STORER BROADCASTING COMPANY,
Defendant-Appellant.

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF OHIO, EASTERN DIVISION

Before: EDWARDS, *Chief Circuit Judge,* WEICK, *Circuit Judge,* and WISEMAN,* *District Judge.*

PER CURIAM. This is a very close case involving the discharge of one James Cox, a news reporter at WJKW-TV and an employee in the bargaining unit represented by the American Federation of Television and Radio Artists (AFTRA).

The clause under which Cox was terminated was Article 24 of the contract covering relationships between Storer and its news reporters. Article 24(b) reads:

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*Honorable THOMAS A. WISEMAN, JR., United States District Judge for the Middle District of Tennessee, sitting by designation.

(b) *Reasons for Termination.* The Company may terminate employment for insubordination, incompetence, misconduct, or any other just and sufficient cause, and unsuitability for staff or program requirements.

The District Judge stated the procedural facts as follows:

> Storer news director Virgil Dominic informed the grievant that he intended to discharge him. When Cox asked if he could resign and still receive severance and termination benefits, he was told he could. Cox said he would prepare a letter of resignation. After a change of mind over the weekend and a withdrawal of his offer to resign, Cox was discharged by news director Dominic on May 30, 1977, effective June 27, 1977. Storer's June 21, 1977 payroll notice listed the reason for termination as "just and sufficient cause pursuant to section 24-B of Storer/AFTRA Contract."
>
> • • •
>
> Unresolved at the first and second steps of the grievance procedure the discharge of James Cox went to arbitration before Arbitrator David Ralph Hertz. The arbitrator sustained the discharge in an award, issued May 22, 1978.

Throughout the arbitration hearing Storer presented evidence concerning the claimed harassment of the Mayor of Brook Park and two of his employees while Cox was pursuing a news story, and additional evidence pertaining to Cox's alleged tardiness, absenteeism and misconduct. Cox denied the charges and filed a grievance which led to the underlying arbitration proceeding. After hearing, the arbitrator denied the grievance, stating, "The formal reason for terminating the grievant's employment was given as 'just and sufficient cause.' • • • Thus, while the

action was stated to be 'for just and sufficient cause,' suitability clearly played a part in concluding that termination was the appropriate action."

In his interpretation of the contract the District Judge treated unsuitability as a wholly different cause, unrelated to the term "just and sufficient cause" and remanded to the arbitrator for reconsideration under the issue as "framed by the parties." The question he phrased was: "Did the evidence support the employer's discharge of Jim Cox for 'just and sufficient cause'?"

Recognizing as we do that the contract language involved in this dispute is ambiguous, we would agree with the District Judge's interpretation if we (or he) were free to do so. One of the strongest principles of labor/management law, however, is that the arbitrator is charged not only with deciding disputes of fact, he is also charged with interpreting the labor/management contract. *United Steelworkers of America v. Enterprise Wheel and Car Corp.*, 363 U.S. 593 (1960); *Steelworkers v. American Manufacturing Co.*, 363 U.S. 564 (1960); *The Kroger Co. v. International Brotherhood of Teamsters*, 380 F.2d 728 (6th Cir. 1967); *United Steelworkers of America v. Caster Mold and Machine Co.*, 345 F.2d 429 (6th Cir. 1965).

We recognize, of course, that under *United Steelworkers of America v. Enterprise Wheel and Car Corp., supra* at 596, the arbitrator is confined to interpretation and application of the collective bargaining agreement, "yet his award is legitimate only so long as it draws its essence from the collective bargaining agreement."

The ambiguous language of this contract does not, however, leave us with the conviction that the arbitrator went outside the bounds of permissible construction of "ambiguous contract language." *See Detroit Coil v. I.A.M.*

and A. Workers, Lodge 82, 594 F.2d 575 (6th Cir.) *cert. denied*, 444 U.S. 840 (1979).

For these reasons we reverse and remand for entry of an order confirming the arbitrator's award in this case.

ORDER OF THE UNITED STATES DISTRICT COURT

(Filed March 4, 1980)

Civil Action
Number C78-931

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF OHIO
EASTERN DIVISION

AMERICAN FEDERATION OF TELEVISION AND RADIO ARTISTS, AFL-CIO,
Plaintiff,

vs.

STORER BROADCASTING CO.,
Defendant.

ORDER

The court having filed its memorandum and order remanding this action to the arbitrator, therefore, pursuant to Rule 58, Federal Rules of Civil Procedure,

IT IS ORDERED that this action is hereby remanded to the arbitrator for further proceedings in accordance with this court's memorandum and order filed March 4, 1980.

/s/ WILLIAM K. THOMAS
WILLIAM K. THOMAS, U.S.D.C. Judge

MEMORANDUM AND ORDER OF THE UNITED STATES DISTRICT COURT

(Filed March 4, 1980)

C78-931

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF OHIO
EASTERN DIVISION

AMERICAN FEDERATION OF TELEVISION AND RADIO ARTISTS, AFL-CIO,
Plaintiff,

v.

STORER BROADCASTING COMPANY,
Defendant.

MEMORANDUM AND ORDER

THOMAS, *J.*

In its complaint, American Federation of Television and Radio Artists, AFL-CIO, Cleveland Local (hereinafter AFTRA), seeks to vacate or modify an arbitration award that upheld the discharge of James Cox, a news reporter at WJKW-TV, owned and operated by defendant Storer Broadcasting Company (hereinafter Storer). Storer counterclaims for confirmation of the award.

This case is before the court on cross-motions for summary judgment. The court has jurisdiction under section 301 of the Labor Management Relations Act, 29 U.S.C. §185 and entertains these motions pursuant to the Federal Arbitration Act, 9 U.S.C. §§9 and 10. The case is submitted on a stipulated record consisting of the arbitration hearing

transcript, exhibits, the parties' post-hearing briefs, post-hearing correspondence between the arbitrator and counsel, and the arbitrator's decision.

I.

A.

On May 27, 1977, Storer news director Virgil Dominic informed the grievant that he intended to discharge him. When Cox asked if he could resign and still receive severance and termination benefits, he was told he could. Cox said he would prepare a letter of resignation. After a change of mind over the weekend and a withdrawal of his offer to resign, Cox was discharged by news director Dominic on May 30, 1977, effective June 27, 1977. Storer's June 21, 1977 payroll notice listed the reason for termination as "just and sufficient cause pursuant to section 24-B of Storer/AFTRA Contract."[1] Section 24(B) (hereinafter sometimes 24(b)) provides:

> B. *Reason for Termination.* The Company may terminate employment for insubordination, incompetence, misconduct, or any other just and sufficient cause, and unsuitability for staff or program requirements.

Unresolved at the first and second steps of the grievance procedure[2] the discharge of James Cox went to arbitration before Abritrator David Ralph Hertz. The arbi-

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1. On May 31, 1977, Virgil Dominic wrote Mr. Cox concerning his discharge. The letter also listed the reason as "just and sufficient cause pursuant to section 24-B."

2. In May, 1977 and before, Storer and AFTRA were parties to a collective bargaining agreement; and James Cox, as a news reporter, was a member of the AFTRA bargaining unit. The agreement's grievance and arbitration clauses set forth a three-step grievance procedure for resolution of employment disputes which, if not resolved in the first or second steps, may upon written request of either party be submitted for arbitration.

trator sustained the discharge in an award, issued May 22, 1978.

While observing that the termination of the grievant "was stated to be 'for just and sufficient cause,' the arbitrator decided that "suitability clearly played a part in concluding that termination was the appropriate action." In its motion for summary judgment, AFTRA argues:

> Despite the entire case being tried on whether or not Cox was discharged for just cause, the arbitrator reached out and took the last clause in Section 24(B), "Unsuitability for staff or program requirements" and decided on his own authority and own feelings that Cox had been terminated for "unsuitability for staff or program requirements." This constituted applying his own brand of industrial justice and not deciding the issue tried before him.

It is correct that at the proceedings, "unsuitability" as a section 24B ground for termination of the grievant, was not advanced by either of the parties. When the arbitrator asked Storer to state "what this case is about," Storer presented its position that Cox's termination" was the culmination of a long history of transgressions" beginning with "tardiness, absenteeism, quality of work, lateness in submitting stories, failure to set forth in a concise manner stories for broadcast," and ending in Cox's conduct in the Brook Park incident which Storer contended threatened its "reputation" and "placed in jeopardy the good will of a news source." Quite directly, Storer thus stated the issue in its post-hearing brief:

> Was the Grievant properly terminated by the Company ". . . for incompetence, misconduct or any other just and sufficient cause . . ." under the "Management Rights" reserved to it under the terms and provisions of the collective bargaining agreement between the Company and the Union?

At the hearing, AFTRA, chose to characterize the issue as whether Storer "[had] just cause for this discharge, and we are saying that they do not. Certainly, it is a disciplinary discharge. There is no question about that." (Tr. 35) In its post-hearing brief, AFTRA similarly phrased the issue:

> The question presented is whether the discharge was for just cause or merely the result of an arbitrary decision to replace a veteran news reporter. Thus, there was no dispute between the parties

that the core issue for the arbitrator to decide was whether Jim Cox was discharged by Virgil Dominic for "misconduct, or any other just and sufficient cause."

The question of "unsuitability" first arose in a letter of May 1, 1978 in which the arbitrator asked each party to "give me in writing [your] comments concerning the relevancy, if any, of the [". . . unsuitability for staff or program requirements."] language . . . to the matters now under consideration."

> AFTRA replied that the "unsuitability" clause has absolutely no relevancy in this matter at all. Cox's discharge was a disciplinary matter and nowhere in the hearing transcript or the brief of the Union and the two briefs of the Company was the so-called "unsuitability clause" mentioned.

Citing Storer's June 21 payroll notice as well as Virgil Dominic's discharge letter to Jim Cox of which rely only on "just and sufficient cause," AFTRA argued that that provision necessarily controlled the sole issue in the case.

While recognizing that it did not originally rely on "unsuitability in discharging Cox, Storer nevertheless contended that "unsuitability" was relevant because,

> The arbitrator has the authority, under the contract, to determine whether the company's termination of Mr. Cox can be justified based upon other provisions of section 24(b) not specifically relied upon by the company. This is because the entire contract is before the arbitrator in this matter as well as all the facts regarding the Grievant's job performance both on the two days in question which gave rise to his discharge as well as his earlier performance which had been reviewed unfavorably by Virgil Dominic. The Arbitrator has the authority under the Contract to apply the contractual language (any or all of it) to the facts situation placed before him. This would naturally include applying the "unsuitability" phrase to the facts of Mr. Cox's conduct placed before him in evidence.

The arbitrator's decision, later quoted, will disclose that the arbitrator concluded that the news director considered "unsuitability" as a factor in terminating the grievant. Out of the arbitrator's reliance on the "unsuitability" clause in his decision grow the questions that will be considered on this review. But first, the arbitrator's development of his decision will be unfolded.

The grievant was given an assignment in late May, 1977 "to cover what was known as the 'Brook Park Tank Plant' story." While earlier exhibits of April and May, 1977 reflected dissatisfaction of the news director with the grievant's performance, it was the incident of the "Brook Park Tank Plant story" which, according to the news director, was "the straw that broke the camel's back."

The testimony of the Mayor of Brook Park, his secretary and the switchboard operator, was credited by the arbitrator, instead of the grievant's denials of their testimony. Their testimony showed, in part, these facts: On May 26, 1977, the news director's assistant received a tele-

phone call from the secretary to the Mayor of Brook Park. He reported to the news director that the secretary called to complain that the grievant, when told that the Mayor was not in his office, screamed at the secretary and called her a liar. She reported that the grievant then said that if the Mayor didn't return the grievant's telephone call by noon, the grievant would say on the air that the Mayor refused to comment. On the next day, May 27, 1977, the Mayor's secretary again called the news director to complain about the grievant's conduct. Unable to reach the Mayor's office and being told that the line was busy, the grievant scolded the switchboard operator saying that she was lying, that he knew that the Mayor was available, and that she knew that the Mayor was trying to avoid the press. The Mayor's secretary also reported that the grievant threatened to have the switchboard operator fired; and by reason of the language allegedly used by the grievant, the switchboard operator was reduced to tears. When the grievant finally got through to the Mayor's secretary and was told that the Mayor was not trying to avoid the press but that his line was busy, the grievant responded with harsh language.

The arbitrator concluded that

> The facts as presented to the news director led him to be disturbed by the probability that grievant's conduct had placed in jeopardy the goodwill of a source of news. He, therefore, apologized for the grievant's alleged conduct.

The arbitrator continued:

> At the same time the News Director knew:
>
> 1. That on April 25, 1977 (Company Exhibit 11) he had written to the grievant about a possible "dereliction of duty";

2. That on April 25, 1977 (Company Exhibit 13) he had occasion to complain of the grievant's "unprofessionalism" and to warn him that "you must improve or face severe consequences";

3. That on May 4, 1977 (See Company Exhibit 20), he had had occasion to tell the grievant about the News Director's "concern over (the grievant's) ability as a television reporter";

4. That on May 5, 1977 (Company's Exhibit 21) the News Director had occasion to say in writing to the grievant, "You have told me you're a good reporter. But your performance continues to cast doubt on your contention. You MUST do better work.";

5. That on May 10, 1977 (Company's Exhibit 25), the News Director had had occasion to point out in writing to the grievant that "we are not in the newspaper business," and that the talents required of a television reporter include "the ability to get to the gut issue of a story and tell that main part of any given story . . . This is what you must do if you are to keep your job here"; and

6. That on May 26, 1977, the News Director (Company's Exhibit 31) had occasion to tell the grievant "Your work continues to fall short of the standards of performance we expect from reporters on this news staff."

After reviewing the events of May 27 and May 30 involving the exchange between the news director and the grievant concerning resignation or discharge, the arbitrator observed:

In his treatment of the grievant, the news director acted deliberately, without loss of temper, showing

> careful restraint, caution, patience and even fraternal compassion.
>
> The News Director offered assistance to the grievant in his efforts to find another job, agreed to give grievant a letter recommending him as a newspaper (as distinguished from a television) reporter, and place the facilities of the station at the grievant's disposal to enable him to prepare material that might be helpful in getting another job.

While noting that the formal reason given for terminating the grievant's employment was "just and sufficient cause," the arbitrator declared:

> A comparison, however, of what the News Director offered the grievant on termination with provisions in section 24(g) of joint exhibit 1, page 35[3] in cases of "termination for unsuitability" reveals that the News Director clearly had in mind not merely the Brook Park incident but also the grievant's "suitability" for the Employer's requirements.

The arbitrator then stated, "Thus, while the action was stated to be 'for just and sufficient cause,' suitability clearly played a part in concluding that termination was the appropriate action." Next, under the heading "THE CONTRACT PROVISIONS," the arbitrator noted that section 24B lists the reasons for which the employer is empowered to terminate employment:

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3. "G. On termination for unsuitability, the Company will give consideration to all the capabilities of the Artist terminated in an endeavor to place such Artist in any other position in or out of the unit, in this station and in all other Storer stations and, if suitable employment is still not found, to do everything possible to obtain the Artist suitable employment at other radio and television stations. The Company will use its best efforts in this regard, but this clause shall not be subject to grievance or arbitration."

> Its language includes "insubordination, incompetency, misconduct or any other just or sufficient cause." It adds "unsuitability for staff or program requirements."

The arbitrator then found an interrelation between "unsuitability" and the other grounds:

> The language added is significant in giving meaning to "insubordination, incompetency, misconduct or any other just or sufficient cause." It suggests that trifling insubordination, minor incompetency, venial misconduct in themselves do not warrant the extreme penalty of termination, but that they and "other just or sufficient cause" may be considered in assessing the extent of appropriate disciplinary action when related to "unsuitability" for the employer's requirements.

Applying this conclusion, the arbitrator states:

> Hence, if the grievant had merely been abrasive in a manner concerning which the employer could afford to be indifferent, his misconduct would not be sufficient to warrant discharge. Since, however, his conduct in this instance was sufficient to engender complaints by the Brook Park officials, his conduct could not be overlooked by the employer. The employer could not sit by idly after one of its sources of news had been antagonized by an employee.
>
> The fact that the grievant otherwise presented reasons to doubt his suitability for the job clearly led to termination rather than to a less extreme form of discipline.

Hence, in upholding the grievant's discharge, the arbitrator intermeshed a finding of the grievant's misconduct in the Brook Park incident with a finding of the grievant's "unsuitability" by reason of that incident as well as "the fact that the grievant otherwise presented reasons to doubt

his suitability for the job." On this review, it is essential to determine if the arbitrator was entitled (a) to legally interpret "unsuitability for staff or program requirements" as applicable to this case; and (b) if applicable, whether he could legally interpret the section 24B provision as one that is susceptible of being coupled with some lesser degree of "misconduct or any other just or sufficient cause as a basis for upholding the discharge." These controlling legal questions will be considered in the next part.

II.

Oft repeated is the proposition that arbitration is favored as a means of resolving labor disputes and, therefore, the courts should refine from reviewing the merits of an arbitration award. *United Steelworkers of America v. Enterprise Wheel and Car Corp.*, 363 U.S. 593, 596 (1960); *Detroit Coil v. I.A.M. & A. Workers, Lodge 82*, 594 F.2d 575 (6th Cir. 1979). However, as the court pointed out in *Detroit Coil*, "a corollary principle bearing equally on labor arbitration was articulated by the Supreme Court in *Enterprise Wheel and Car Corp., supra*, at 597:

> [A]n arbitrator is confined to interpretation and application of the collective bargaining agreement; he does not sit to dispense his own brand of industrial justice. He may of course look for guidance from many sources, yet his award is legitimate only so long as it draws its essence from the collective bargaining agreement. When the arbitrator's words manifest an infidelity to this obligation, courts have no choice but to refuse enforcement of the award.

Detroit Coil thus summarizes at p. 579 the rule applicable here.

> Thus, while an arbitrator has considerable latitude, his powers are not unlimited in the resolution of labor dis-

> putes. The arbitrator is confined to the interpretation and application of the collective bargaining agreement, and although he may construe ambiguous contract language, he is without authority to disregard or modify plan and unambiguous provisions. (Citations)

In its response to the arbitrator's inquiry about the language: "unsuitability for staff or program requirements," AFTRA told him, "[a]s contrast between termination for just cause and for unsuitability, see section 24G of the AFTRA contract." Section 24G, *supra*, at n. 3, specifies that "on termination for unsuitability" efforts to assist an artist in gaining other employment, should be considered and undertaken by the employer. These contractual but non-arbitrable obligations of the employer do not exist with reference to an employee terminated for "just or sufficient cause." Construed *in pari materia*, construction of section 24B and G require the conclusion that terminations for "unsuitability" are intended to be differentiated and treated separately from terminations for "insubordination, incompentency, misconduct, or any other just or sufficient cause." What then is the scope of the separate ground of "unsuitability for staff or program requirements" for which reason the company may also terminate employment?

Fortuitously, an arbitration award between the same parties, Storer Broadcasting Company and AFTRA, dated June 14, 1978, Arbitrator Samuel S. Perry, involves the same unsuitability clause and provides answers. James Hale, anchor man at WJKW, was advised by news director Virgil Dominic that at the end of his personal contract, due to expire September 10, 1977, he would be discharged on the grounds of unsuitability for staff and program requirements. AFTRA filed a grievance charging that this was a pretext and that the company had the

burden of proving that he was discharged for just cause. Interpreting section 24B, Arbitrator Perry disagreed. He ruled:

> Unlike the majority of collective bargaining agreements, this Agreement, like others in the broadcast industry, *permits discharge for other than just cause. Unsuitability is sufficient grounds.* It is true that the Station has failed to prove that the Grievant was discharged for just cause (other than unsuitability), but AFTRA errs in asserting that such is the Station's burden. Manifestly, on the face of the agreement, it is not so. [Emphasis added.]

To show the true meaning of unsuitability, Arbitrator Perry turned to a decision of Arbitrator David Ralph Hertz, "cited by the Station [*i.e.*, Storer]", namely, *WJMF Broadcasting Company*, 52 L.A. 995 (Arbitrator Hertz, 1969). Arbitrator Hertz was construing different language, i.e., relief "from duty for lack of work or other legitimate reason." However, Arbitrator Perry, construing the unsuitability clause, said that "the cases and text cited by [Storer] appropriately demonstrate how such language has been interpreted by other arbitrators." Arbitrator Hertz thus explicated the equivalent provision:

> The contract itself clearly recognized in specific words problems peculiar to the broadcasting industry because the usefulness and effectiveness of an employee cannot be measured by objective standards. Its employees differ from those in a mass production industry where performance may be evaluated in such terms as the number of pieces produced per hour and the quantity of material used or wasted in achieving such production.
>
> No such standards are available to determine whether an announcer is serving the interests of his Station.

> In terms of the Station's success an announcer's performance is good or bad only if the announcer wins and retains his listeners. If, however, those who hear him disagree among themselves concerning the quality of his work, there is no measuring stick to determine the validity of either a favorable or an unfavorable opinion, for both frequently are largely matters of subjective taste.

Arbitrator Hertz then defined the "second situation:"

> For this reason, the contract makes provisions for a second situation, *namely, one in which despite absence of cause for discharge, the interests of the enterprise require nevertheless that the employee's services be terminated.*
>
> For such cases, the contract specifically reserves to the Employer the right to make the determination required; subject, however, to the implied condition that the employer must act in good faith. [Emphasis added.]

While Arbitrator Hertz's statements are directed at lack of mass production standards in determining "whether an announcer is serving the interests of his station," Arbitrator Perry nonetheless extended Arbitrator Hertz's rationale to Jim Hale, WJKW-TV news anchorman. He ruled that after "painstaking analysis of available data and personal observation," management concluded that "Grievant was unsuitable for employment in any capacity as a news person with the Station." But this was not a matter of professional incompetence. Rather in applying the "unsuitability clause," it was an "evaluation of the Grievant's suitability to fit into the *new format* in any capacity." (Emphasis added.)

The application of the "new format" must be in good faith.

> In order for the Station's determination of the unsuitability of the Grievant [Hale] to have been proper, it must have been neither arbitrary or capricious. The Station, in determining that the Grievant did not fit anywhere into its new scheme, must have made a *bona fide* investigation into making a Management decision.

In sum, as Arbitrator Charles L. Mullin, Jr., stated in WIXY/AFTRA Arbitration Award of October 30, 1975 (appendix H to plaintiff's brief), "unsuitability for staff and program requirements is not in essence a disciplinary concept." Therefore, "unsuitability" requires something different than a showing of an employee's professional incompetence or his inability to do a particular job. If this were not so, then the "unsuitability" clause could be used as a substitute for section 24B's requirement that the employment termination be for "incompetence, misconduct or any other just or sufficient cause." Then the "unsuitability" clause could thereby be applied subjectively by an employer to weed out a particular employee just because in the sole judgment of the employer that employee is "unsuitable." Rather, as Arbitrator Perry ruled, adopting Storer's position, the "unsuitability clause" applies where a "new format" has been established (either in program or staff requirements) and the employer decides in good faith that the "grievant did not fit anywhere into its new scheme."

Contrary to the recognized meaning of the "unsuitability" clause, applicable only when a station has adopted a "new format" in "staff or program requirements," Arbitrator Hertz now interprets "unsuitability" as "significant in giving meaning to 'insubordination, incompetency, misconduct or any other just or sufficient cause.'" He says that, "trifling insubordination, minor incompetency, venial misconduct," that is, lesser degrees of those grounds for

discharge, may be considered in assessing the extent of appropriate disciplinary action when related to "unsuitability" for the employer's requirements. James Cox's ability "to get to the gut issue of a story and tell that main part of any given story" undoubtedly bears on his professional competence as a TV news reporter, but it does not bear on "the grievant's 'suitability' for the Employer's requirements" within the established meaning of the "unsuitability" clause.

As seen, Arbitrator Hertz concluded that "the News Director clearly had in mind not merely the Brook Park incident, but also the Grievant's 'suitability' for the employer's requirements." Occurring in the same time frame as the discharge of Jim Cox, the termination of Jim Hale reveals that when news director Dominic has the unsuitability clause "in mind" in terminating an employee, he knows how to use that section. He did not use it in discharging Cox. Hence, the arbitrator's suggestion that news director Dominic had the "unsuitability" clause "in mind" in the Cox case, is gratuitous and unsupported.

Moreover, Arbitrator Hertz improperly applied the unsuitability clause, contrary to its legal meaning and purpose when he ruled:

> Thus, while the action was stated to be "for just and sufficient cause," suitability clearly played a part in concluding that termination was the appropriate action.

As previously made clear by Arbitrator David Ralph Hertz in *WFMJ Broadcasting Co., supra,* the "unsuitability" clause is not to be read in support of the "just and sufficient cause" but it is applied, "despite the absence of cause for discharge." In short, as a ground for termination, the "unsuitability" clause must be applied independently of the "just and sufficient cause" ground.

In the *Jim Hale* arbitration, with Arbitrator Perry's approval, Storer asserted the established meaning of the "unsuitability" clause, relying on Arbitrator Hertz' ruling in *WFMJ Broadcasting Co., supra.* That established meaning is the plain and unambiguous meaning of the "unsuitability" clause which Arbitrator Hertz was "without authority to disregard or modify" in this case, *Detroit Coil v. I.A.M. & Workers, Local 82, supra,* at 579.[4] Thus it was wholly inappropriate on the present record for the arbitrator to rely on the "unsuitability" clause as a basis for his ruling.

Nonetheless, it was the arbitrator's responsibility to rule directly upon the issue, framed by the parties, as previously defined. Did the evidence support the employer's discharge of Jim Cox for "just and sufficient cause"? More particularly, did the evidence support his discharge for "incompetence, misconduct, or any other just or sufficient cause"? The case is remanded to the arbitrator to make a ruling on that relevant and controlling issue. The case shall be heard on the record as taken, supplemented by any new evidence which the parties, despite due diligence, were unable to present at the first hearing. Should Arbitrator Hertz be unable to conduct further proceedings in this manner, a new arbitrator shall be appointed in accordance with the rules of the American Arbitration Association. If a new arbitrator is appointed, he shall conduct further proceedings consistent with this opinion.

IT IS SO ORDERED.

/s/ WILLIAM K. THOMAS
U.S. District Judge

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4. Thus, arbitrator Hertz's decision is not "rationally deduced from the agreement." *Timken Co. v. Local Union No. 1123, United Steelworkers of America,* 482 F.2d 1012, 1015 (6th Cir. 1973).

OPINION AND AWARD OF ARBITRATOR

(Dated May 22, 1978)

AMERICAN ARBITRATION ASSOCIATION

Case Number: 53 30 0261 77

VOLUNTARY LABOR ARBITRATION TRIBUNAL

IN THE MATTER OF THE ARBITRATION BETWEEN

THE STORER BROADCASTING COMPANY OWNER AND OPERATORS OF STATION WJKW-TV

The Employer

and

CLEVELAND LOCAL, AMERICAN FEDERATION OF TELEVISION AND RADIO ARTISTS, AFL-CIO

AWARD OF ARBITRATOR

The Undersigned Arbitrator, having been designated in accordance with the arbitration agreement entered into by the above-named Parties, and dated

and having been duly sworn and having duly heard the proofs and allegations of the Parties, Awards as follows:

THE GRIEVANCE IS DENIED.

/s/ DAVID RALPH HERTZ
Arbitrator's signature (dated)
DAVID RALPH HERTZ *Arbitrator*
1020 Leader Building
Cleveland, Ohio 44114

Case No. 53 30 0261 77

AMERICAN ARBITRATION ASSOCIATION

DAVID RALPH HERTZ

Arbitrator

GRIEVANCE: JAMES COX—DISCHARGE

IN THE MATTER OF THE ARBITRATION BETWEEN

THE STORER BROADCASTING COMPANY, OWNER AND OPERATOR OF STATION WJKW-TV

The Employer

and

CLEVELAND LOCAL, AMERICAN FEDERATION OF TELEVISION AND RADIO ARTISTS, AFL-CIO

The Union

ARBITRATION OPINION AND AWARD

APPEARANCES

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THE GRIEVANT'S ATTORNEY:

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Attorney for Employee, James Cox

Employer, Union, Grievant and News Director, as used hereinafter, will refer, respectively: to Storer Broadcasting Company, the owners and operators of Television Station WJKW-TV in Cleveland, Ohio; the American Federation of Television and Radio Artists, AFL-CIO, which is the collective bargaining agent concerned; the Employee who was discharged by the Employer on May 27, 1977, effective June 27, 1977; and the person under whose direction and supervision the grievant had been acting as a news reporter.

This matter comes before the Arbitrator pursuant to the provisions of the Agreement to which the Employer and the Union are parties and which is in evidence as Joint Exhibit 1.

Section 24(b) appearing in Joint Exhibit 1 at Page 32 reads:

"(b) *Reasons for termination*

"The Company may terminate employment for insubordination, incompetency, misconduct or any other just or sufficient cause, and *unsuitability for staff or program requirements.*" (Italics supplied.)

At the time of discharge, the Employer stated formally as the reason therefor:

". . . just and sufficient cause pursuant to Section 24(B) [sic] of WJKW-TV/AFTRA contract."

The Brief of the Union addresses itself to the claim that the discharge was "without just cause" because (a)

the Employer failed to meet the burden of proof to sustain discharge; (b) the Employer failed to accord the grievant an adequate investigation or hearing; (c) the discharge was clearly excessive.

The Employer's Brief takes the position that the grievant had been given ample warning that his performance was unsatisfactory and that if that performance did not improve, termination of employment was likely to follow; that the Employer by nature of its operations and functions "is particularly interested in maintaining cordial relations with news sources, including public officials"; and that

The Employer, in good faith, concluded that the grievant was guilty of conduct which had brought disgrace upon the Employer when he acted in an unprofessional fashion.

The Employer also takes the position that nothing before the Arbitrator warrants a conclusion that the Employer had been guilty of arbitrary or capricious conduct which would warrant substitution by the Arbitrator of his judgment for that of the Employer.

DISCUSSION OF THE FACTS

The grievant had been in the service of the Employer for some ten (10) years. His record is a speckled one. It includes impressive commendations from public officials and others who were familiar with his work. (See Union's Exhibits 11, 12, 13, 14, 15, 16 and 17.) It also includes awards and other forms of recognition given to the grievant for his professional performance and instances wherein he was complimented by his supervisor for excellent performance. (See Company's Exhibit 12.)

It also includes a number of adverse criticisms and reprimands by the News Director. (See, for example, Company's Exhibit 2 dated May 27, 1977; Company's Exhibit 11

dated April 11, 1977; Company's Exhibit 13 dated April 25, 1977; Company's Exhibit 16 dated April 28, 1977; and an oral reprimand for tardiness given on April 20, 1977, to which reference is made in Company's Exhibit 17.) These Exhibits reflect dissatisfaction with the grievant's performance prior to the incident which, according to the News Director (Record Page 307), was "the straw that broke the camel's back."

That incident was related to the manner in which the grievant conducted himself on an assignment given him late in May of 1977 to cover what was known as the "Brook Park tank plant" story.

On May 26, 1977, the News Director's assistant received a telephone call from the Secretary to the Mayor of Brook Park. He reported to the News Director that the Secretary called to complain that the grievant had telephoned to talk with the Mayor and was told that the Mayor was not in his office. She reported that the grievant then screamed at her and called her a liar. She reported that the grievant then said that if the Mayor didn't return the grievant's telephone call by noon, the grievant would say on the air that the Mayor had refused comment. The Mayor's Secretary, therefore, asked that such statement be not allowed on the air because it was untrue. She also said that the grievant's failure to speak with the Mayor was due to the Mayor's absence from his office.

That afternoon the News Director telephoned the Mayor's Secretary to discuss the grievant's alleged behavior and she repeated the story to him.

On the next day the Mayor's Secretary called the News Director again to complain about the grievant's conduct. She claimed that on May 27, 1977, the grievant called again asking for the Mayor's Office and was told that the line was busy; that he then scolded the switchboard op-

erator, saying that she was lying; that he knew that the Mayor was available and that she knew that the Mayor was trying to avoid the press. She reported also that the grievant threatened to have the switchboard operator fired and that the switchboard operator, by reason of the language allegedly used by the grievant, was reduced to tears.

She also reported that the operator then put the grievant through to the Mayor's Secretary, who said that she explained to the grievant that the Mayor was not trying to avoid the press and that his line was busy. She claimed that the grievant responded with harsh language.

It appears that at the very time that the grievant was thus speaking with the Mayor's Secretary, the Employer's Assignment Editor got through to the Mayor and obtained the information sought. The Assignment Editor reports that he then gave the grievant the information.

The Mayor's Secretary, among other things, also reported that the grievant and a camera crew "invaded" the office of the City Clerk, demanding a copy of an ordinance governing open meetings, an encounter which "terrified" the Clerk.

The contents of the complaint by the Mayor's Secretary were communicated to the grievant by the News Director. The grievant denied having acted as alleged.

At the hearing, the telephone operator, the Mayor's Secretary, the Mayor, the Clerk, and the Assignment Editor, all under oath, gave sworn testimony largely supporting the occurrence of the incidents recited. While their testimony was not free from those discrepancies and inconsistencies which are frequently encountered on comparing the testimony of witnesses, their testimony is deserving of greater credence than the grievant's testimony which, while admitting that he acted aggressively in trying to get his story and was frustrated in his efforts, denies that he went

any farther than the customary aggressiveness of a news gatherer in pursuit of a story.

It is undisputed, however, that the Brook Park employees were impelled to make a complaint to the grievant's Employer. It is unreasonable to believe that the complaint would have been made had the grievant's conduct been as mild as he claims it to have been.

At any rate, it seems clear that the facts as presented to the News Director led him to be disturbed by the probability that the grievant's conduct had placed in jeopardy the good will of a source of news. He, therefore, apologized for the grievant's alleged conduct.

At the same time the News Director knew:

1. That on April 11, 1977 (Company Exhibit 11) he had written to the grievant about a possible "dereliction of duty";

2. That on April 25, 1977 (Company Exhibit 13) he had occasion to complain of the grievant's "unprofessionalism" and to warn him that "you must improve or face severe consequences";

3. That on May 4, 1977, (See Company Exhibit 20) he had had occasion to tell the grievant about the News Director's "concern over (the grievant's) ability as a television reporter";

4. That on May 5, 1977 (Company's Exhibit 21) the News Director had occasion to say in writing to the grievant, "You have told me you're a good reporter. But your performance continues to cast doubt on your contention. You MUST do better work.";

5. That on May 10, 1977 (Company's Exhibit 25), the News Director had had occasion to point out in writing to the grievant that "we are not in the news-

paper business," and that the talents required of a television reporter include "the ability to get to the gut issue of a story and tell that main part of any given story . . . This is what you must do if you are to keep your job here"; and

6. That on May 26, 1977, the News Director (Company's Exhibit 31) had occasion to tell the grievant "Your work continues to fall short of the standards of performance we expect from reporters on this news staff."

It is thus apparent that on May 27, 1977, when the News Director had received complaints from the Brook Park people concerning the grievant's conduct, dissatisfaction with the grievant's prior performance had been communicated to the grievant so that he knew that such dissatisfaction was on the News Director's mind.

According to Company's Exhibit 35, which is a memorandum dated May 30, 1977, concerning a conference between the grievant and the News Director, prepared in the ordinary course of business *ante litem motam* by the News Director, the grievant, after he had been informed that his employment would be terminated as of June 27, 1977, asked for permission to resign and that the matter be treated confidentially. The News Director consented.

Despite the requested confidentiality, word was soon around the office, under circumstances which indicated that the grievant himself did not observe the silence he had requested. Accordingly, the News Director telephoned him to learn what was going on, at which time the grievant told the News Director that he would not resign.

Thereafter, the grievant's employment was terminated, as appears from Company's Exhibit 6. The termination

was made effective June 27, 1977, with regular compensation to be paid the grievant through that date. He was given additional compensation or severance pay for two (2) weeks and two (2) days of vacation pay. At his request his insurance was continued. In addition, a contribution was made to the Union Fund.

In his treatment of the grievant, the News Director acted deliberately, without loss of temper, showing careful restraint, caution, patience and even fraternal compassion.

The News Director offered assistance to the grievant in his efforts to find another job, agreed to give grievant a letter recommending him as a newspaper (as distinguished from a television) reporter, and placed the facilities of the station at the grievant's disposal to enable him to prepare material that might be helpful in getting another job.

The formal reason for terminating the grievant's employment was given as "just and sufficient cause." A comparison, however, of what the News Director offered the grievant on termination with provisions in Section 24(g) of Joint Exhibit 1, Page 35, in cases of "termination for unsuitability", reveals that the News Director clearly had in mind not merely the Brook Park incidents, but also the grievant's "suitability" for the Employer's requirements.

Thus, while the action was stated to be "for just and sufficient cause," suitability clearly played a part in concluding that termination was the appropriate action.

THE CONTRACT PROVISIONS

The above quoted Section 24(b) lists the reasons for which the Employer is empowered to terminate employment. Its language includes "insubordination, incompe-

tency, misconduct or any other just or sufficient cause." It adds "unsuitability for staff or program requirements."

The language added is significant in giving meaning to "insubordination, incompetency, misconduct or any other just or sufficient cause." It suggests that trifling insubordination, minor incompetency, venial misconduct in themselves do not warrant the extreme penalty of termination, but that they and "other just or sufficient cause" may be considered in assessing the extent of appropriate disciplinary action when related to "unsuitability" for the Employer's requirements.

Hence, if the grievant had merely been abrasive in a manner concerning which the Employer could afford to be indifferent, his misconduct would not be sufficient to warrant discharge. Since, however, his conduct in this instance was sufficient to engender complaints by the Brook Park officials, his conduct could not be overlooked by the Employer. The Employer could not sit by idly after one of its sources of news had been antagonized by an employee.

The fact that the grievant otherwise presented reasons to doubt his suitability for the job clearly led to termination rather than to a less extreme form of discipline. . .

CONCLUSION

From the foregoing, it appears that the Employer has exhibited facts constituting reasons for termination of employment under Section 24(b) of Joint Exhibit 1.

The evidence also shows that the Employer accorded the grievant an adequate investigation or hearing and that the statement in the Brief filed herein on behalf of the grievant (see Brief of AFTRA, Page 24) that "personal animus" played a part in the News Director's conduct,

is entirely without foundation. On the contrary, the record is clear that the News Director proceeded carefully, cautiously and with compassion.

Thus, the record exhibits no reason that would justify disturbing the conclusion reached without animus after investigation and careful consideration by the individual who was charged with the responsibility to act.

For these reasons the grievance is denied and award is made accordingly.

Respectfully submitted,

/s/ DAVID RALPH HERTZ
DAVID RALPH HERTZ, *Arbitrator*
1020 Leader Building
Cleveland, Ohio 44114
696-5211
Dated this 22nd day of May, 1978,
at Cleveland, Ohio.

AWARD OF ARBITRATOR IN MALRITE OF OHIO, INC., OWNERS AND OPERATORS OF RADIO STATIONS WHK AND WMMS AND AFTRA

Case Number: 53 30 0117 76

AMERICAN ARBITRATION ASSOCIATION
VOLUNTARY LABOR ARBITRATION TRIBUNAL

In the Matter of the Arbitration between
MALRITE OF OHIO, INC., OWNERS AND OPERATORS OF RADIO STATIONS WHK AND WMMS

and

AMERICAN FEDERATION OF TELEVISION AND RADIO ARTISTS, CLEVELAND LOCAL

AWARD OF ARBITRATOR

The Undersigned Arbitrator(s), having been designated in accordance with the arbitration agreement entered into by the above-named Parties, and dated

and having been duly sworn and having duly heard the proofs and allegations of the Parties, Awards as follows:

The grievance of Kenneth Hildebrand is sustained to the extent that the Company is directed to calculate and remit dismissal pay to the grievant in an amount equal to one weeks salary for each year of employment, or fraction thereof, at the station and to include grievant's employment at the station during the time Metromedia, Inc., the predecessor owner, owned such station; in all other re-

spects the grievance is denied and the termination of the grievant's employment is upheld.

/s/ Charles F. Ipavec
October 28, 1977

* * * * *

OPINION AND AWARD

Grievance filed by Kenneth Hildebrand

Hearings for this case in arbitration were held on April 4, 1977, in a conference room of the Cleveland Regional Office of the American Arbitration Association; and on June 28, 1977, and July 5, 1977, in a conference room of the Bond Court Hotel, Cleveland, Ohio, before Charles F. Ipavec, the impartial arbitrator mutually selected by the parties pursuant to Section 7 of the Collective Bargaining Agreement in effect between the parties, through the administrative services of the Cleveland Regional Office of the American Arbitration Association.

Joseph A. Rotolo, Attorney, presented the case on behalf of the Company. Also present were Carl E. Hirsch, Executive Vice President; John Clark Chaffee, Jr., Vice President for Programming; John G. Rosenwald, Station Manager; and Marvin Lester Boone, Acting News Director.

Thurlow Smoot, Attorney, presented the case on behalf of the Union. Also present were Kenneth A. Bichl, Executive Secretary and Kenneth Hildebrand, grievant.

The parties stipulated that the issues, as presented to the arbitrator, are arbitrable, and that there were no objections on either procedural grounds or on substantive grounds. The Union made an electronic recording of the proceedings at the hearing; however, the arbitrator ruled that there would be no official record of the proceedings. Both parties filed post hearing briefs.

ISSUE

The issue as presented to the arbitrator may be stated thusly: Did the Company violate the Agreement between the parties when it terminated the grievant, Ken Hildebrand; and if it is found that such termination did not violate said Agreement, did the Company properly calculate the dismissal pay, tendered to the grievant; and, if it is found that the Company did violate said Agreement in any respect, to what remedy, if any, is the grievant entitled?

DECISION

The within labor dispute was precipitated when the Company made the decision to terminate the grievant, Kenneth Hildebrand, as evidenced by the following notice sent to the grievant:

> "CONFIRMING OUR CONVERSATION EARLIER TODAY YOUR EMPLOYMENT IS BEING TERMINATED FOR UNSUITABILITY FOR PROGRAM REQUIREMENTS AND OTHER JUST AND SUFFICIENT REASONS YOU ARE HEREBY BEING GIVEN THREE WEEKS NOTICE EFFECTIVE TOMORROW MORNING AND YOU WILL BE EXPECTED TO WORK OUT YOUR NOTICE." (sic)

Subsequently, the Company calculated dismissal pay, on the basis of the length of service, in years, which the grievant performed work for the Company, and the Company calculated such length of service by using as the initial date of service, the date upon which the Company acquired the facility known as radio station WHK, which was the radio station upon which the grievant appeared as a news announcer. When the Company tendered such dismissal pay, the grievant, through the Cleveland Local of AFTRA,

objected to the method of calculation, and further objected to the discharge itself. The within matter, not having been resolved by the utilization of the grievance procedure provided by the Agreement between the parties, was then referred to arbitration.

The Agreement between the parties provides that a member of the bargaining unit may be terminated if it is found that such employee is unsuitable for the programming requirements of the Company. In the opinion of the arbitrator, the question of unsuitability for programming involves a determination of the artistry manifested by the individual, and the marketability with and acceptance by the listening audience of such individual. The concept of unsuitability for programming is a matter to be determined by management, and it would be only under special, agreed upon, situations, which were not present in this case, that an arbitrator may have submitted to him the question of unsuitability for programming. In this case, the parties agreed that the issue of unsuitability for programming was not being submitted to the arbitrator, so that then, in the opinion of the arbitrator, the question of unsuitability for programming is a question which is determined by the Company, and is subject to review only on the challenge that the reason as given by the Company, to wit, unsuitability for programming, is not in fact the true reason, but rather, that the Company is circumventing other applicable provisions of the Agreement between the parties; and, by means of a subterfuge, the reason for termination of employment is given as unsuitability for programming rather than the true reason.

In the notice of termination sent to the grievant, the Company cited not only unsuitability for programming, but also cited as an additional reason for termination, other sufficient reasons; and, in the opinion of the arbitrator, when other sufficient reasons were cited as addi-

tional reasons for termination of the employment of the grievant, in addition to the reason of unsuitability for programming, the Company clouded the issue because it intermingled two non-compatible reasons for termination; first, unsuitability for programming, which is determined solely by the Company, and second, the reason of other sufficient reasons, which is a reason for termination subject to the proper and sufficient clause requirements of the Agreement between the parties. Most of the evidence presented at the hearing, by the Company, was aimed at proving that the grievant was unsuitable for the programming desired by the Company, and very little evidence was presented to show that the grievant had engaged in conduct which would have constituted other sufficient reasons for which the grievant could have been given the severe penalty of discharge as a first discipline.

In the opinion of the arbitrator, the evidence presented at the hearing clearly showed that the Company's only reason for terminating the employment of the grievant was that grievant became unsuitable for programming, which means that the grievant did not project the image, across the airwaves, which the Company wished to have projected.

The Union alleged that the Company violated Section 39 of the Agreement between the parties, which provides as follows:

> 38. - *NON-DISCRIMINATION*
>
> Neither the Company nor AFTRA shall discriminate against any Artist or applicant for employment, because of race, creed, age, sex or place of national origin.

Specifically, the Union alleged that the Company discriminated against the grievant on the basis of age. In

the type of situation found here it is not easy to differentiate between discrimination based upon age and unsuitability for programming, because the image which the Company wished for the grievant to project was a youthful and vibrant image; and, it may very well have been that the grievant was not able to project the desired image because the grievant is older, on the average, than the other radio on-air personalities which the Company has assembled; however, the grievant's employment was terminated not because of his age, but rather, because grievant was not able to project the desired on-air image. The age itself of the grievant did not necessarily preclude the grievant from projecting the desired image and mix with the other on-air personalities; but rather, the grievant, because he had reached the personal age at which the grievant did not wish to change a delivery which had been highly accepted for many years in the past, then resisted the Company's attempt to remold the grievant into a newscaster which would supplement and complement the other on-air personalities. Unfortunately the grievant also suffered, during the transitional period of time when the changes in format were being brought about, a great personal tragedy, which, understandably, prevented the grievant from acting in an exuberant manner in emulation of the other on-air personalities.

When a machinist, as an example, suffers a tragedy, and because the machine being operated will run equally well when the operator is sad as when the operator is happy; the duties, however, which the grievant was required to perform, because they require the projecting of a certain mood, and a certain exuberance, are not performed with the same degree of apparent skill when the newscaster is sad or when the newscaster is happy. The mental state of the newscaster can have a significant im-

pact on the projected personality, even to the point that the performance could be considered as being unsuitable for programming.

In the opinion of the arbitrator, the termination of the grievant was for the sole reason that grievant was not suitable for the programming requirements of the Company, which reason for termination requires the assessment and evaluation of the artistry of the grievant which is an assessment and evaluation the arbitrator can not make, first because the parties agreed not to submit the evaluation of the grievant's artistry to the arbitrator; and second, because the Company traditionally, and as the Agreement between the parties has been interpreted, retained the sole discretionary powers to evaluate the artistry of its employees who are members of the within bargaining unit.

The Union also alleged that the stated reason for termination of unsuitability is a subterfuge, because the Agreement between the parties provides in Section 29 C, as follows:

> 29. - *DISMISSAL PAY*
>
> C. On termination for unsuitability, the Company shall give consideration to all the capabilities of the Staff Announcer in an endeavor to place the Staff Announcer in any position in or out of the Unit, in the Station and in all other Company stations and, if suitable employment is still not found, to do everything possible to obtain the Staff Announcer suitable employment at other radio and/or television stations. The Company will use its best efforts in this regard but this paragraph shall not be subject to grievance or arbitration.

The Union specifically alleged that the Company made no effort, whatsoever, to comply with the above provision

of the Agreement between the parties in that the Company made no effort whatsoever to place the grievant in any other position, either in or out of the within bargaining unit; and that such a no effort posture, on the part of the Company, clearly implies that the Company did not wish to retain the grievant in a job grievant could perform satisfactorily, but rather the Company simply wanted to get rid of the grievant.

The evidence presented at the hearing indicated that the grievant expressed the desire to continue performing on the air, and since the Company had made the determination that the grievant was not suitable for programming, which means that the Company does not wish to continue the grievant's on the air performances; it stands to reason then, if the grievant is to continue performing on the air, new employment will have to be found with a radio station which adheres to a programming which is closer aligned to the grievant's capabilities. The grievant did find employment with another radio station.

When an employee is terminated, dismissal pay becomes vested in accordance with Section 29, A and B of the Agreement between the parties, and which provides as follows:

29. - *DISMISSAL PAY*

A. The Company may terminate employment of Staff Announcers for insubordination, incompetence, misconduct, reduction of staff, unsuitability for staff and program requirements or any other just and sufficient cause.

B. Upon termination of employment by the Company, the Staff Announcer shall receive:

(1) three weeks notice (of termination) or three weeks salary (gross), in lieu thereof; and

(2) an amount equal to one weeks salary (gross) for each year of employment or fraction thereof, by the Company at the Station up to a maximum of 18 weeks pay.

The Company has alleged that dismissal pay is to be calculated on the basis of the years of employment by the Company, which is Malrite of Ohio, Inc., and at the Station which is WHK; so that no credit for employment by a predecessor Owner of Station WHK may be counted.

In the previous Collective Bargaining Agreement, negotiated by the previous owner of station WHK, Metromedia, Inc., the following appeared:

29. — *DISMISSAL PAY*

The Company may terminate the employment of Staff Announcers only upon the following conditions:

(a) Upon termination of his employment by the Company, except under paragraph (b) below, the Staff Announcer shall receive:

(i) Three weeks' notice, or three weeks' minimum base staff salary only, in lieu thereof; and

(ii) an amount equal to one week's minimum base staff salary (for WHK see Section 14, Paragraph A; for WMMS, see Section 10(d)) and, for WHK only, minimum guaranteed "AFTRA Compensation" (see Section 14, Paragraph B, subparagraph 1 or 2) only for each year of employment, or fraction thereof, by the Company, at the Station, up to a maximum of eighteen weeks' pay.

When the Company purchased radio station WHK from Metromedia, Inc. the Company agreed to abide by

the provisions of the Collective Bargaining Agreement negotiated by the Union and Metromedia, Inc. and which Agreement covered the period of time from November 19, 1971 to November 19, 1974. However, when the present Agreement between the parties became effective, on November 19, 1974, the reference to the Company, in Section 29 B(2), meant this Company, Malrite of Ohio, Inc., because it was now this Company which had negotiated the new agreement and it was this Company which was named as one of the contracting parties; whereas, under the 1971-74 Agreement the reference to the Company in Section 29(a)(ii) meant Metromedia, Inc., since such predecessor owner was a contracting party. While the parties were operating under the 1971-74 Agreement, negotiated by the Union with the predecessor owner, Metromedia, Inc., the Company honored all service in employment, with the predecessor owner, Metromedia, Inc., when dismissal pay was being calculated; however, under the current Agreement between the parties, only the employment by this Company was used to calculate dismissal pay.

The pertinent language contained in the 1971-74 Agreement provided, employment by the Company at the station up to a maximum of 18 weeks pay, and the identical pertinent language was retained, or repeated in the present Agreement between the parties which covers the period 1974-77. A reading of the pertinent language pointed out herein gives a first impression, and in the opinion of the arbitrator repeated reading gives a permanent impression, that when a benefit is conferred by certain specific contract language, the retention, or repeating, in the next collective bargaining agreement of the identical language should confer an identical benefit.

The Company of course argues that such is not the case because the term, the Company, has a different meaning under the current Agreement between the parties be-

cause now such term refers to this Company, and that the language was specifically negotiated so as to cut off the benefit resulting from including employment with the predecessor owner when dismissal pay was being calculated.

Although it is true that Section 29 was considerably altered as to content and as to the layout of its various provisions, the pertinent language for this case remained identical, namely, employment by the Company at the station up to a maximum of 18 weeks pay; and, in the opinion of the arbitrator, the intent of the parties which may logically flow from such language, was that an identical benefit was being retained, and which benefit included the credit for employment by the previous owner when dismissal pay is to be calculated. When the present Agreement between the parties was being negotiated in 1974, the Company had owned the station for approximately two years and the Agreement was to continue into 1977, so that, at the termination date of the present Agreement on November 9, 1977 the Company will have owned the station for approximately seven years. In calculating dismissal pay, as of today, and including the fractional portions of years, an employee could not have credit, under the Company's argument, for more than six years or fractions thereof, of employment, so that the maximum dismissal pay would be six weeks salary. Why then was a maximum of 18 weeks pay provision retained, if it was not to limit the number of years of employment credit, carried over by an employee as a result of having been employed by the previous owner. The limitation of 18 weeks pay as a maximum has no meaning under the Company's argument, and the Arbitrator must give a logical meaning to each applicable provision of the Agreement between the parties, to the end result that the logical connotation is that the 18 weeks maximum provision clearly indicates that credit for

employment with the previous owner was clearly contemplated when identical language was repeated and thereby conferred an identical benefit upon the members of the bargaining unit when dismissal pay was to be calculated.

If it was the Company's intention, at negotiations, to reduce the dismissal pay benefit, which the Company had assumed and extended under the former collective bargaining agreement; because, in the opinion of the arbitrator, dismissal pay is a mandatory subject of negotiation from the standpoint that no change in dismissal pay may be made unilaterally, but rather such a change must result from negotiations at collective bargaining; it then became incumbent upon the Company to propose a change in the language which conferred a specific dismissal pay benefit, to reflect the manner in which the benefit was being reduced, and the fact that the contracting party, as reflected in the written document, was changed from the name of the previous owner to the Company, was not a change which would result in a diminution of the dismissal pay benefit; and the arbitrator's interpretation is supported by the continuation of the 18 weeks maximum, because if only employment with the Company was to count, such would result in a maximum of six weeks whereas the Agreement between the parties, clearly, provides for an 18 week maximum.

In the opinion of the arbitrator, the 18 week maximum was inserted, or retained, in the Agreement between the parties, because the parties contemplated that some members of the bargaining unit would have sufficient years of employment credit that it could be possible for a dismissal pay to exceed 18 weeks unless limited by a maximum; now then, if it was contemplated that the 18 week maximum would be invoked, and it must have been so contemplated or else the language would not appear in the

Agreement; it follows, that it was contemplated, more than the years of employment by the Company would be credited when calculating dismissal pay because the Company's tenure of ownership was less than three years at the effective date of the Agreement, and will be less than six years at the termination date of the Agreement.

In the opinion of the arbitrator, the grievant Kenneth Hildebrand should be paid a dismissal pay which is calculated by giving the grievant credit for employment by the next preceding employer, Metromedia, Inc., subject, of course, to the 18 weeks maximum benefit.

AWARD

The grievance of Kenneth Hildebrand is sustained to the extent that the Company is directed to calculate and remit dismissal pay to the grievant in an amount equal to one week's salary for each year of employment, or fraction thereof, at the station and to include grievant's employment at the station during the time Metromedia, Inc., the predecessor owner, owned such station; in all other respects the grievance is denied and the termination of the grievant's employment is upheld.

/s/ CHARLES F. IPAVEC
Arbitrator

Dated October 28, 1977 and made effective at the Company's facility in Cleveland, Cuyahoga County, Ohio.

ARBITRATOR'S AWARD IN RADIO STATION WIXY, WESTCHESTER BROADCASTING CORPORATION DIVISION OF GLOBETROTTER COMMUNICATIONS, INC. AND AFTRA

AAA FILE NO: 53 30 0040 75

IN THE MATTER OF ARBITRATION

BETWEEN

RADIO STATION WIXY
WESTCHESTER BROADCASTING CORPORATION
DIVISION OF GLOBETROTTER
COMMUNICATIONS, INC.

AND

AMERICAN FEDERATION OF TELEVISION AND
RADIO ARTISTS, CLEVELAND LOCAL
BOTH OF CLEVELAND, OHIO

DECISION IN DISCHARGE GRIEVANCE (TERRY STEVENS)

GRIEVANCE:

The grievance protests the Grievant's discharge as lacking in just cause.

AWARD:

The grievance is denied.

HEARING:

May 23 and July 21, 1975; Cleveland, Ohio.

ARBITRATOR:

Charles L. Mullin, Jr.

APPEARANCES

For the Company

R. M. Lyon, Attorney

G. A. Killoren, Vice President & Treasurer, Globetrotter Communications, Inc.

T. Collins, Director of Operations, Station WDEE, Detroit

J. Risher, General Manager, Station WDEE, Detroit

R. G. Smith, Station Manager, Station WODK, Cleveland

S. Kelly, Operations Manager

For the Union

T. Smoot, Attorney

K. Bichl, Executive Secretary

R. Bremkamp, Jr., General Manager, Station WJW, Cleveland

T. Stevens, Grievant

Administration

The undersigned was selected by representatives of the American Federation of Television and Radio Artists, Cleveland Local, and Globetrotter Communications, Inc., Westchester Division, owner and operator of Radio Stations WIXY and WDOK, to hear and decide a matter in dispute between the Parties. Arbitration hearings were conducted in the offices of the American Arbitration Association in Cleveland, Ohio, on May 23, and July 21, 1975. Both Parties appeared and were represented by legal counsel who presented testimony, written evidence and oral arguments in support of their respective positions. A written record of the proceedings was taken and subsequently transcribed, following which Post Hearing Briefs were filed. After reviewing all of the evidence thus compiled, the undersigned issues the following decision.

Grievance And Question To Be Resolved

Correspondence from Mr. Ken Bichl, the Executive Secretary of the Union, dated November 26, 1974 to the General Manager of Radio Station WIXY succinctly sets forth the claim which constitutes the subject matter of this case:

> On November 14 AFTRA filed an "appeal of discharge" in the termination of Terry Stevens. We were advised in a letter dated November 19 from Tom Collins that Terry Stevens was terminated "as unsuitable for staff and program duties."
>
> There were not grounds for the termination of Terry Stevens' employment and in accordance with Paragraph D of Section XXV AFTRA now requests the reinstatement of Terry Stevens to his former employment with no loss of seniority or pay.

The undersigned must now ascertain whether this termination of the Grievant by the Radio Station was contrary to any pertinent provision of the Collective Bargaining Agreement in effect between the Parties.

Cited Portions Of The Agreement

The following portions of the Agreement were cited:

XXV. Layoffs, Terminations, Separation Pay and Reemployment

. . .

B. Reasons for Termination

The Company may terminate employment for insubordination, incompetence, misconduct, or any other just and sufficient cause, reduction of staff and unsuitability for staff and program requirements.

C. Discharge for Serious Cause

In case of flagrant neglect of duty, drunkenness, dishonesty, or other serious cause or in who's case the facts demonstrate the discharge was self-provoked, the discharge may be summary and without termination pay.

Background Facts

The Grievant, Mr. Terry Stevens, was hired in July of 1972 as a Staff Announcer for Station WIXY, and at all times pertinent to the outcome of this case he was scheduled on the air and in fact worked from 2:00 P.M. to 6:00 P.M.

Testimony on the record indicates that beginning in approximately May of 1974 the Company initiated efforts to recoup losses in Station WIXY's popularity and to increase revenues. Prior to that time the Station's music format was predominantly contemporary rock and roll designed to appeal to a teenage audience. The Station then decided to modify the composition of its programs so as to appeal to listeners in the 18 to 34 age bracket. One of the changes designed to accomplish this was the adoption of block programming which would emphasize different types of music, such as "straight contemporary" or "black tunes," at particular hours. In response to an inquiry concerning the impact of this change, the Grievant responded at Page 133 of the July 21 transcript as follows:

Yes, Sir.

What happened was the available audience or audience we already had, the teen audience that looks for a total sound, total 24-hour identification, could no longer find it. It would only be on certain times; their type of music.

> There was no real housewife appeal at all for the middle of the day and black music stations, that's pretty hard to get into. The black community is very solid behind their two stations in the community and had no interest in a white station playing black music.

On November 11, 1974 Mr. Stevens was dismissed by the Station. The present grievance was thereafter processed to arbitration, and at the arbitration hearing the Company, relied upon several grounds to support its termination action. The voluminous record of the proceedings is replete with references to the Grievant's alleged poor general attitude toward the programming, his repeated unauthorized additions and deletions, marked on the official program logs, instances where he supposedly left the Station premises without recording commercial advertising, and a general decline of his program ratings, evidencing decreasing popularity. However, the evidence does not disclose the Management had, with one notable exception, made any effort in the past to correct the Grievant's general attitude, to eliminate the unauthorized additions and deletions, or to cause him to cease leaving the premises without recording commercial advertising.

Against this backdrop, and inasmuch as the gravamen of the charge against the Grievant was his "unsuitability for staff and program requirements," the undersigned deems the evidence with regard to the other charges, collateral to the real crux of this case concerning whether the Grievant's ratings rendered him unsuitable for staff and program requirements at the time in question. Accordingly, attention is directed to the significance of the Grievant's declining ratings in the Discussion And Findings portion of this opinion.

Contentions Of The Parties

Company Contentions

The Company argues that the evidence at hand demonstrates that the performance of the Grievant was indeed unsuitable for staff and program requirements within the meaning of Article XXV, Section B of the Collective Bargaining Agreement. It maintains that its action in terminating the employment of the Grievant is not properly subject to review under the just cause standard, and that under the controlling portion of the Agreement, Management's discretion is restricted only by an implied condition of acting in good faith.

Union Contentions

The Union's position is that the reasons cited by the Company in support of the Grievant's dismissal were not substantiated by the evidence. It asserts that the downward trend of WIXY's ratings was due to its change in format involving block programming and efforts to reach more of the black audience, as well as increased competition. It urges the undersigned to hold that the Grievant was not discharged for just cause although the evidence adduced by the Company reveals that his dismissal was disciplinary in nature.

Discussion And Findings

Initially, it is incumbent upon the undersigned to ascribe some meaning to the contractual language which constitutes the focal point of the instant controversy. This language, in Article XXV, includes two distinct paragraphs dealing with "Reasons for Termination" and "Discharge for Serious Cause." Therefore, the conclusion is inescapable that the Parties did, during negotiations, contemplate different factual situations which would give rise to the Com-

pany's severance of an employe. In this case clearly there has been no allegation of flagrant or aggravated deliberate misconduct, and the facts on record clearly bring the case within Paragraph B which is entitled, "Reasons for Termination." Therein, specific forms of unsatisfactory conduct are enumerated along with more general proscriptions of a disciplinary nature, as well as certain business considerations which constitute acceptable reasons for termination. The Company has seized upon "unsuitability for staff and program requirements" as the basis for sustaining its action with respect to the Grievant, although certain conduct by the Grievant having disciplinary overtones has been injected into the record in support thereof.

It would appear, however, that this case turns upon the question of whether the Company has succeeded in proving the alleged unsuitability of the Grievant; and he is aware that much depends upon the meaning accorded to that term in its present context. In the endeavor to interpret this language, the question at once arises as to who the Parties intended to determine an employe's "unsuitability." It seems obvious that this function would be appropriate for Management, but then the inquiry becomes "By what standards are Management's decisions to be tested?" The scheme of draftsmanship in Paragraph B suggests that something other than the just and sufficient cause standard was to be the touchstone, both since that standard is expressly set forth as a clause unto itself and because unsuitability for staff and program requirements is not in essence a disciplinary concept. Rather, it appears to be a type of disqualification peculiar to the business of radio broadcasting and colored by the customs prevailing in that enterprise.

In order to survive in a competitive economy, the Management of a Company must be entrusted with the authority and flexibility to decide what products it will

offer to the consumer market so as to maximize its profits. This is especially so in broadcasting, and the evidence in this case itself demonstrates that audiences are fickle and that music and the form of its broadcast presentation have many subtle variations which make it more or less appealing to certain segments of the listening population. Station WIXY exists by selling to advertisers the exposure to the public which it can claim only by providing listeners with the type of music they want to hear. Against this backdrop, an arbitrator is hardly qualified to substitute his judgment for Management's as to what personality is suitable for a particular format; rather, his task is to ascertain only whether Management's action was premised on a reasonable, identifiable, and objective basis.

The case to which the undersigned was referred by the Union for guidance and in which Arbitrator Jerome Gross decided in favor of the Union, although it admittedly involved similar contract language, arose from a factual situation distinct in an aspect which the undersigned deems critical in the case at hand. There, no attempt to revise the station's format had been initiated prior to the Grievant's discharge, whereas here the Station's attempt to create a new image was in effect the moving force behind the Grievant's dismissal. It is undisputed that in approximately May of 1974, Station WIXY forsook the teen oriented market in favor of the more subdued group of listeners in the 18-34 age bracket because of its conclusion that the latter segment of the population had greater purchasing power and that more advertising efforts would be directed towards reaching those listeners. There can be no question that such decisions are peculiarly within the province of Managerial discretion, and neither the Union nor the arbitrator has any basis upon which to challenge the wisdom or propriety of such a legitimate exercise of Management's functions.

Numerous exhibits were introduced at the arbitration hearing by both Parties to reflect the ratings attributed to Station WIXY during the hours that the Grievant was on the air. These ratings are computed by independent agencies which attempt to poll the public regarding listening habits and relate their findings to the radio stations for certain fees. Despite the fact that the figures thus obtained are admittedly subject to certain infirmities, such as the fact that ratings are routinely provided for the period from 3:00 P.M. until 7:00 P.M. and the present Grievant's normal work shift was from 2:00 P.M. until 6:00 P.M., the evidence in this case convinces the undersigned that these ratings are customarily relied upon by both stations and their advertising customers as indices of the station's popularity or competitive status. The undersigned has analyzed the evidence produced by the Parties which purports to show the trend of Station WIXY's popularity in the years 1973, 1974 and 1975, and one firm conclusion emerges. Although the Grievant appears to have been in vogue when the Station's emphasis was placed on satisfying the teen group or audience, especially in 1973, the time slot for which the Grievant was primarily responsible earned significantly lower and increasingly diminishing ratings in 1974. Thus at the time of his discharge, and this factor is critical, the Grievant simply didn't have strong appeal to the audience that Management sought to gain.

The true reasons for the erosion of a radio station's ratings are not suspectable of certain ascertainment, and this arbitrator is not prepared to attempt to isolate them. What is important in this case is that the ratings which the Company regularly relied upon in the operation of its business, and which purport to describe its competitive status, gave Management good cause to initiate attempts to recoup the ratings losses. The Grievant himself conceded that it was difficult to make inroads with black audiences.

The undersigned is persuaded that the ratings drop was an objective indication that the Grievant was unsuitable for the type of programming adopted in the Spring of 1974, and under the above analysis of the discretion afforded to Management with respect to determining suitability under Paragraph B, this constituted an adequate reason for discontinuing his employment with the Station on a non-disciplinary basis.

It is observed that, notwithstanding the foregoing conclusion, the Grievant is clearly not an unacceptable employe in the sense normally attendant with a situation where services are terminated. The impression gathered from his testimony at the hearing was that the Grievant did indeed have extensive knowledge of music in many of the popular idioms. The fact of his knowledge and performing abilities is attested to by the fact of his employment by another local station not long after his separation from Station WIXY. The critical fact is that the Station's need was for a performing artist with somewhat different performing abilities. Noteworthy is the fact that there have been many performers—including those involved in the most popular television programs over many years—who have in effect been terminated for the same reason, that is, that the audience response had waned in that case simply because of the passage of time. That fact did not establish that the performer was "bad"—it did establish a clear and reasonable basis for the performer's replacement at a given point.

For all of the foregoing reasons, the relief requested cannot be granted.

* * * * *

The Undersigned Arbitrator(s), having been designated in accordance with the Arbitration Agreement entered into by the above-named Parties, and dated February

7, 1975, and having been duly sworn and having duly heard the proofs and allegations of the Parties, Award, as follows:

The grievance is denied.

/s/ (Illegible)
Pittsburgh, Pennsylvania
October 30, 1975

ARBITRATOR AWARD IN STORER BROADCASTING COMPANY TELEVISION STATION WJW-TV AND AMERICAN FEDERATION OF TELEVISION AND RADIO ARTISTS CLEVELAND, OHIO LOCAL

AAA Case No. 53 30 0375-77

AMERICAN ARBITRATION ASSOCIATION
VOLUNTARY LABOR ARBITRATION TRIBUNAL

In the Matter of the Arbitration
Between
STORER BROADCASTING COMPANY TELEVISION STATION WJW-TV
and
AMERICAN FEDERATION OF TELEVISION AND RADIO ARTISTS
CLEVELAND, OHIO LOCAL

OPINION AND AWARD

James Hale, Grievant
Samuel S. Perry, Impartial Arbitrator
File No. P03 0181

The Impartial Arbitrator, Samuel S. Perry, was mutually selected by the parties and appointed in accordance

with the rules of the American Arbitration Association, to hear and decide this matter.

The oral hearing(s) in this matter were held in a Conference Room at the offices of the American Arbitration Association, 930 Williamson Building, 215 Euclid Avenue, Cleveland, Ohio 44114.

A record of the proceedings was made by Susan Begam, Stenotype Reporter of the Firm of Reilender, Ferris, Skomski, 781 Union Commerce Building, Cleveland, Ohio 44115.

The following appearances were made for each of the Parties:

On December 9, 1977

For the Company:

Wilson Chockley, Attorney
William J. Flynn, V.P.G.M. - WJKW-TV
Virgil Dominic, News Director, WJKW-TV

For the Union:

Thurlow Smoot, Attorney for AFTRA
Kenneth Bichl, Executive Secretary
Annette G. Butler, Attorney
Wilton S. Sogg, Attorney
James Hale, Grievant

On January 18, 1978

For the Company:

F. Wilson Chockley, Jr., Attorney
William J. Flynn, V.P.
David E. Schreiner, Attorney
Virgil Dominic, WJKW-TV

For the Union:

Thurlow Smoot, Attonrey
Kenneth Bichl, AFTRA, Executive Secretary
Jim Hale, AFTRA Member, Grievant
Annette G. Butler, Attorney
Wilton S. Sogg, Attorney

On March 22, 1978

For the Company:

F. Wilson Chockley, Jr., Attorney
Virgil Dominic, News Director

For the Union:

Thurlow Smoot, Attorney for AFTRA
Jim Hale, Grievant
Annette G. Butler, Attorney for Hale
Jeff Maynor, Witness
Kenneth Bichl, AFTRA, Executive Secretary
John F. Fitzgerald, AFTRA National Bd.

The Parties waived a separation of witnesses and stipulated that the oath be administered to all witnesses.

At the conclusion of the oral hearing(s) on March 22, 1978, both Parties stated they would file a post-hearing brief thirty (30) days after receipt of the transcript of this matter.

The oral proceedings in this matter were concluded on March 22, 1978.

Both the Company and the Union have approved publication of this Opinion and Award.

The Parties have requested that each be provided with three (3) copies of this Opinion and Award.

By letter of transmittal, dated April 4, 1978, the Reporter submitted the original transcript of the proceedings to the Arbitrator and advised both Parties and the American Arbitration Association of its delivery.

By letter dated April 5, 1978, the American Arbitration Association advised the Arbitrator and the Parties, that post-hearing briefs were due on or before May 4, 1978.

By letter dated May 5, 1978, the American Arbitration Association advised the Arbitrator and the Parties that the hearing was declared closed on May 5, 1978, and the Arbitrator shall have thirty (30) days from that date, or on or before June 4, 1978, within which to render his Opinion and Award.

By letter, dated June 5, 1978, the American Arbitration Association, advised the Parties that the Arbitrator had requested an extension of time to June 14, 1978, within which to submit his Opinion and Award. This request for an extension of time was granted.

THE GRIEVANCE:

The grievance was submitted to the Arbitrator (Joint Exhibit #2), which states as follows:

July 26, 1977

Mr. Virgil Dominic
WJKW-TV News Director
5800 S. Marginal Road
Cleveland, Ohio 44103

Dear Virgil:

You have advised both Jim Hale and * * * * that at the end of their Personal contracts they will be discharged on the grounds of unsuitability for staff and program requirements.

Both of these Artists have applied their discharges to AFTRA and accordingly we are here filing grievance in accordance with the provisions of Article 9 of the Staff contract. This is also to be considered the Appeal of Discharge for both men and AFTRA demands that their termination notices be cancelled and that they be advised they will continue on staff from the end of their personal contracts, doing so under the full and complete provisions of the staff contract.

Sincerely,

Ken Bichl

c: B. Flynn
T. Smoot
J. Hale

* * * *

ISSUE:

Whether the Company, pursuant to the terms of the Collective Bargaining Agreement, existing between the Parties, had just cause to terminate the Grievant, James Hale.

PERTINENT PROVISIONS OF THE COLLECTIVE BARGAINING AGREEMENT (Joint Exhibit # 1):

24. LAYOFFS, TERMINATIONS, SEPARATION PAY AND RE-EMPLOYMENT

(b) *Reasons for Termination.* The Company may terminate employment for insubordination, incompetence, misconduct, or any other just and sufficient cause, and unsuitability for staff or program requirements.

(g) On termination for unsuitability, the Company will give consideration to all the capabilities of the

> Artists in any other position in or out of the unit, in this station and in all other Storer stations and, if suitable employment is still not found, to do everything possible to obtain the Artist suitable employment at other radio and television stations. The Company will use its best efforts in this regard, but this clause shall not be subject to grievance or arbitration.

FACTS AND BACKGROUND:

The Employer herein is the Storer Broadcasting Company and WJKW-TV (formerly WJW-TV), which will collectively be referred to as the "Station." The Grievant, James Hale, is a former employee of the Station, and is represented in this proceeding by his union, the American Federation of Television and Radio Artists, hereinafter referred to as "AFTRA."

AFTRA and the Station are parties to a collective bargaining agreement (Joint Exhibit #1), hereinafter referred to as the "Agreement," which was entered into on November 19, 1975, and which is effective from November 15, 1975 through January 31, 1979 (Joint Exhibit #1, pp. 1, 46). It is undisputed that the Grievant is a member of the bargaining unit and that he is entitled to the benefits of the Agreement.

James Hale, the Grievant, also entered into an Agreement for Personal Services with the Station. This document (Union Exhibit #3), which will be referred to as the "Contract," was made directly between the Grievant and the Station; AFTRA is not a party to it. The Contract was for one year commencing September 11, 1973 and was renewable three times at the option of the Station (Union Exhibit #3, para. 2). The Contract was in fact renewed three times and was due to expire on September 10, 1977.

This Contract stated that the Grievant was being employed as a Staff Announcer, and that he may be assigned to station programming in many capacities, including performance, and that he may be assigned as News Anchorman or as a Street Reporter. The Grievant was in fact assigned to perform the duties of Anchorman.

On January 1, 1977 William Flynn became Vice President and General Manager of the Station (TR I, pp. 20-30). It is not disputed that Mr. Flynn's experience in the broadcast field before coming to Cleveland was quite extensive. Upon assuming his duties, Mr. Flynn replaced many personnel at the Station, including the Station Manager, the person in charge of the Promotion Department, the Production Manager, and the News Director. Virgil Dominic became the new News Director (TR I, pp. 37-41, 82).

On June 27, 1977 Mr. Dominic met with the Grievant and informed him that his Contract would not be renewed upon its expiration on September 10, 1977 (TR II, pp. 119-120, 141). On September 8, 1977 the Station issued the Grievant a Payroll Notice (Joint Exhibit #4) which stated that his Contract was not being renewed. A supplementary Payroll Notice was issued five days later (Joint Exhibit #5) containing the same language.

On July 18, 1977 Mr. Dominic wrote to the Grievant (Union Exhibit #11), stating that his Contract was not being renewed and that he was being terminated as a Staff Announcer pursuant to Section 24(b) of the Agreement (Joint Exhibit #1, p. 32) for "unsuitability for Staff and Program Requirements."

Jeff Maynor, the Grievant's co-Anchorman, worked for the Station under a contractual situation in essence identical to that of the Grievant. Although Mr. Maynor's Personal Services Contract also was not renewed, he was retained by the Station as a live Mini-Cam Reporter;

the Grievant was not retained in any capacity (TR II, p. 69; TR III, pp. 41-42, 69, 79-80, 121-122).

During Mr. Dominic's tenure as News Director, four Reporters remained with the station, five left, and eight new Reporters were hired, for a net increase of three Reporters (TR I, pp. 130-136; TR II, pp. 33-36; TR III, pp. 129-132).

POSITION OF AFTRA

AFTRA first maintains that the Station has the burden of proving that it discharged the Grievant for just cause, "just cause" being as defined in the Grievant" Contract. It is asserted that the Station did not meet its burden of proof in this regard (AFTRA Brief, pp. 16-17).

AFTRA argues that the Grievant was not terminated for unsuitability pursuant to the Agreement and that such argument on the part of the Station is a pretext. On June 27, 1977 the Grievant was informed that he was being terminated because his Contract was expiring. This was the real reason for discharge, and the Station's later change to grounds of unsuitability was an attempt to bring the termination under the purview of the Agreement (AFTRA Brief, p. 17).

It is asserted that the Grievant was qualified to perform myriad duties at the Station other than that of Anchorman, including that of Reporter; that several staff Reporter openings occurred before the Grievant left; that the Grievant's Contract stated that he may be assigned duties as a Reporter; and that he should have been assigned such duties rather than terminated. AFTRA feels that the Grievant's extensive qualifications were not taken into account by the Station prior to termination, although Section 24(g) of the Agreement (Joint Exhibit #1, p. 35) requires that such a review be made (AFTRA Brief, pp. 18-21).

AFTRA also maintains that the Grievant received treatment disparate from that accorded Jeff Maynor, the implication being that such disparate treatment was improper, solely because the Grievant's Contract had an expiration date four months earlier than Mr. Maynor's. The Station initially assigned Mr. Maynor to the Mini-Cam as a Reporter because it did not wish to pay him for four months for doing nothing. It is asserted that Mr. Maynor was retained in that position because the Station then discovered that he was too good to let go. The Grievant, it is argued, should be given the same opportunity.

Staff Announcer and News Person are job classifications protected under the Agreement. The Grievant, according to his Contract, was hired under these job classifications. Therefore, although the Station was not required to continue him as an Anchorman, it is barred by the Agreement from terminating his employment entirely (AFTRA Brief, pp. 23-24).

The Grievant's termination was arbitrary, capricious, without merit, and was in violation of the Agreement. It is requested that he be offered reinstatement with back pay and all seniority and other rights afforded him by the Agreement (AFTRA Brief, pp. 22, 26).

POSITION OF THE STATION

The personnel changes decided upon by Mr. Flynn were effected in order to attract advertisers to the Station by changing the Station's format to a basis more easily accepted by advertisers, one which would appeal to a younger audience, the type of audience the advertisers are trying to reach. The Station evaluated its personnel in order to accomplish its objective. Mr. Flynn and Mr. Dominic both evaluated the News Department personnel (Station Brief, p. 10).

The Station maintains that Mr. Dominic, in February, 1978, began a personal day to day observation of news Department personnel, including the Grievant. Rating and research agencies were consulted as well.

The Station contends that Mr. Dominic determined that the Grievant's voice delivery, writing style, and viewpoint did not appeal to the younger audience to which the Station felt it had to appeal. This determination of unsuitability was based on rating and consulting reports, his day to day observation and evaluation of the Grievant, and on Mr. Dominic's experience in the broadcast industry. The Grievant was not suited to attract the necessary younger audience and the Station decided that he was not suited to perform its newscasts in any capacity, as Anchorman or Staff Reporter. This determination of the Grievant's present style made his past experience as a news reporter a factor that was not considered by Management. Accordingly, he was terminated (Station Brief, pp. 11-12).

Citing several cases in support of its position, the Station argues that the traditional "just cause" criterion for discharge is inapplicable to the broadcast industry in general and to this Agreement in particular. Unsuitability by itself is proper grounds for termination. The determination of unsuitability itself is a management prerogative and must, by its nature, be a subjective decision. There is a requirement that an employer act in good faith in making such a determination, and it is asserted that the Station did, in fact, act in good faith in the Grievant's case. Unsuitability was not a mere pretext to get rid of him.

Unsuitability was the original and continuing reason for the Grievant's termination. The Station first determined that the Grievant was unsuitable. It then sought a legal opinion on the proper method to terminate his employment. The forthcoming legal opinion was to the effect

that the proper method was to allow the Grievant's Contract to expire without renewal, and this was the basis for the Station's conversation with the Grievant on June 27, 1977, and for the issuance of the first two Payroll Notices (Joint Exhibit #4 and #5). The July 18, 1977 letter to the Grievant (Union Exhibit #11), specifically stating the original unsuitability grounds, was issued after a revised opinion from counsel stated that the Agreement, and not just the Contract, must be followed.

It is also argued by the Station that Jeff Maynor, although relieved as Anchorman, was retained as a live Mini-Cam Reporter because the Station determined that he had a young enough image, was glib enough, and could *ad lib* sufficiently to carry out the duties of that position in keeping with the Station's policies. Since it had been determined that the Grievant lacked these qualities, he could not be offered such a position. No animus was involved, and the Station did not act in an arbitrary or capricious manner.

It is further argued that the Station was not obligated to offer the Grievant a Staff Reporter position because of his seniority because there was no reduction in staff.

Pursuant to the Agreement, the Station assisted the Grievant in his search for employment within the industry.

In light of the above considerations, the Company requests that the grievance be denied and the termination of the Grievant sustained.

DISCUSSION AND OPINION:

Management of the Station, and Mr. Flynn in particular, did not relinquish any authority in the Agreement (Joint Exhibit #1) regarding the Station's format or image, or its position or attitude *vis-a-vis* its advertisers, current or

potential. The voluminous testimony and other evidence presented as justification for Mr. Flynn's decision to change the Station's image may go to the correctness of the decision which he eventually made as to image and format, but the propriety of his making such a decision, as opposed to the correctness of the decision itself, is unaltered by the Agreement itself. This was purely a business decision.

Regarding the Station's authority to terminate the Grievant, the Agreement states, in Section 24(b) (Joint Exhibit #1, p. 32):

> (b) *Reasons for Termination.* The Company may terminate employment for . . . any other just and sufficient cause, and unsuitability for staff or program requirement.

Unlike the majority of collective bargaining agreements, this Agreement, like others in the broadcast industry, permits discharge for other than just cause. Unsuitability is sufficient grounds. It is true that the Station has failed to prove that the Grievant was discharged for just cause (other than unsuitability), but AFTRA errs in asserting that such is the Station's burden. Manifestly, on the face of the Agreement, it is not so. The cases and text cited by the Station appropriate demonstrate how such language has been interpreted by other arbitrators. Their analysis and judgment is quite similar to that expressed here. *See, WFMJ Broadcasting Company*, 52 LA 995 (Arbitrator Hertz 1969); *Taft Broadcasting Company*, 64 LA 211 (Arbitrator Goetz 1974).

By its very nature, a determination of unsuitability must be subjective. The Arbitrator is without authority to substitute his judgment for that of Management in the making of this decision absent a finding that the Station acted in an arbitrary or capricious manner or in a way other than in good faith in coming to its decision.

The Arbitrator makes the finding that unsuitability was the reason for termination of the Grievant's employment from the outset (June 27, 1977). The expiration of his personal Contract was not a reason for termination, but was merely the vehicle chosen by management, on the mistaken advice of counsel, to effectuate its previously decided upon termination of Grievant's employment for unsuitability. When properly informed by counsel, Management corrected its previous error by letter (Union Exhibit #11). The defect was procedural, not substantive, and was corrected in a timely manner. No pretext of subterfuge was proven by AFTRA.

On pages 23-24 of its Brief, AFTRA makes the following argument:

> Thus, the Company is not required to continue Hale as an anchor person but the Company is barred from discontinuing his employment entirely since Hale was hired as a staff announcer and news person which are job classifications protected under the AFTRA Contract and specifically assigned to Hale under his being hired by the Company.

The first word of the above-quoted paragraph, "Thus," refers to Sections 6(a), 6(b), and 6(c) of the Agreement, stating that the Grievant did not waive any of his vested rights under the Agreement (See AFTRA Brief, p. 22). From a detailed reading of the cited sections of the Agreement, it does not appear to the Arbitrator that Section 6 thereof is applicable, except in that it permits artists to negotiate more favorable terms in their personal contracts than are present in the Agreement (Section 6(c)). The "more favorable" term to which AFTRA refers is presumably the Staff Announcer appointment (Union Exhibit #3, para. 1.(a)); other duties, such as program performance production, preparation, and writing, and Anchorman and

Street Reporter duties are optional assignment at the discretion of the Station: "he may be assigned." The AFTRA statement that Staff Announcer and News Person are job classifications protected under the Agreement has no meaning in the present context. Staff Announcer and Staff News Editor are merely defined, news Person, as such is not even defined (Joint Exhibit #1, pp. 3-4). The Arbitrator cannot agree that either the Agreement or the Contract requires the Station to continue the Grievant's employment in either of the stated capacities if he is properly found to be unsuitable for either job at the Station.

If it is assumed that the Station properly evaluated the Grievant's suitability and talents, as well as those of Jeff Maynor, the decision to keep Mr. Maynor as a live Mini-Cam Reporter was properly a Management decision. It was determined that Mr. Maynor's talents and image were suited to the Mini-Cam task, while the Grievant's were not. The treatment accorded the Grievant was therefore not disparate when compared to the Station's treatment of Mr. Maynor.

In order for the Station's determination of the unsuitability of the Grievant to have been proper, it must have been neither arbitrary or capricious. The Station, in determining that the Grievant did not fit anywhere into its new scheme, must have made a *bona fide* investigation into making a Management decision. Such decision only becomes reviewable in arbitration where such *bona fide* effort on the part of Management is lacking.

Further, there is a mandate in the Agreement (not subject to arbitration) for such a review of qualifications, in Section 24(g) (Joint Exhibit #1, p. 35):

> (g) On termination for unsuitability, the Company will give consideration to all the capabilities of the Artist terminated in an endeavor to place such

> Artist in any other position in or out of the unit, in this station and in all other Storer stations. . . this clause shall not be subject to grievance or arbitration.

Thus for these two reasons, only the first of which is arbitrable and thus at issue here, the Station had reason to make a thorough investigation of the Grievant's abilities.

AFTRA contends that the Station did not make a valid investigation into the Grievant's background qualifications and present capabilities for performing regular Staff Reporter duties. These background qualifications are well documented in the record (See TR I, pp. 119, 126-127, 129-130, 173). The Station admits that the Grievant's past qualifications were not considered important because Management wished to rely on its personal evaluation of his present capabilities. See TR I, pp. 67, 150; TR II, pp. 84-85; TR III, pp. 154-157.

In its evaluation of the Grievant's suitability to fit into the new format in any capacity, Management observed the Grievant on a personal day to day basis or three months. TR I, pp. 86, 99-100. Management, after such careful observation, came to the conclusion that the Grievant was unsuitable for employment in any capacity as a news person with the station (TR III, pp. 65-67, 102, 123, 154-157). This conclusion was only reached after painstaking analysis of available data and personal observation. The decision to terminate the Grievant followed this conclusion (TR I, pp. 41, 52, 65-67, 150; TR II, pp. 31, 84; TR III, pp. 102, 123, 155-157).

The Station has presented a *prima facie* case that its termination of the Grievant for unsuitability, which is generally proper under the Agreement, was done on a rational basis and only after much research, personal observation, and the application of broadcast management experience. AFTRA has failed to demonstrate that this

Management decision was intrinsically improper or that it was made in an arbitrary or capricious manner.

No violation of the Agreement having been demonstrated, the grievance must be denied.

/s/ SAMUEL S. PERRY
Impartial Arbitrator

* * * * *

The Undersigned Arbitrator(s), having been designated in accordance with the arbitration agreement entered into by the above-named Parties, and dated November 15, 1975 through January 31, 1979 and having duly heard the proofs and allegations of the Parties, awards as follows.

The grievance of James Hale is denied.

Opinion rendered, Award signed, issued, and dated at Cleveland, Cuyahoga County, Ohio, this 14th day of June, 1978.

/s/ SAMUEL S. PERRY
Arbitrator

UNITED STATES CODE PROVISIONS

9 U.S.C. §9

§ 9. Award of arbitrators; confirmation; jurisdiction; procedure

If the parties in their agreement have agreed that a judgment of the court shall be entered upon the award made pursuant to the arbitration, and shall specify the court, then at any time within one year after the award is made any party to the arbitration may apply to the court so specified for an order confirming the award, and thereupon the court must grant such an order unless the award is vacated, modified, or corrected as prescribed in sections 10 and 11 of this title. If no court is specified in

the agreement of the parties, then such application may be made to the United States court in and for the district within which such award was made. Notice of the application shall be served upon the adverse party, and thereupon the court shall have jurisdiction of such party as though he had appeared generally in the proceeding. If the adverse party is a resident of the district within which the award was made, such service shall be made upon the adverse party or his attorney as prescribed by law for service of notice of motion in an action in the same court. If the adverse party shall be a nonresident, then the notice of the application shall be served by the marshal of any district within which the adverse party may be found in manner as other process of the court.

9 U.S.C. §10

§ 10. Same; vacation; grounds; rehearing

In either of the following cases the United States court in and for the district wherein the award was made may make an order vacating the award upon the application of any party to the arbitration—

(a) Where the award was procured by corruption, fraud, or undue means.

(b) Where there was evident partiality or corruption in the arbitrators, or either of them.

(c) Where the arbitrators were guilty of misconduct in refusing to postpone the hearing, upon sufficient cause shown, or in refusing to hear evidence pertinent and material to the controversy; or of any other misbehavior by which the rights of any party have been prejudiced.

(d) Where the arbitrators exceeded their powers, or so imperfectly executed them that a mutual, final, and definite award upon the subject matter submitted was not made.

(e) Where an award is vacated and the time within which the agreement required the award to be made has not expired the court may, in its discretion, direct a rehearing by the arbitrators.

29 U.S.C. §185

§ 185. Suits by and against labor organizations

Venue, amount, and citizenship

(a) Suits for violation of contracts between an employer and a labor organization representing employees in an industry affecting commerce as defined in the chapter, or between any such labor organizations, may be brought in any district court of the United States having jurisdiction of the parties, without respect to the amount in controversy or without regard to the citizenship of the parties.

9 U.S.C. §11

§ 11. Same; modification or correction; grounds; order

In either of the following cases the United States court in and for the district wherein the award was made may make an order modifying or correcting the award upon the application of any party to the arbitration—

(a) Where there was an evident material miscalculation of figures or an evident material mistake in the description of any person, thing, or property referred to in the award.

(b) Where the arbitrators have awarded upon a matter not submitted to them, unless it is a matter not affecting the merits of the decision upon the matter submitted.

(c) Where the award is imperfect in matter of form not affecting the merits of the controversy.

The order may modify and correct the award, so as to effect the intent thereof and promote justice between the parties.

9 U.S.C. §12

§ 12. Notice of motions to vacate or modify; service; stay of proceedings

Notice of a motion to vacate, modify, or correct an award must be served upon the adverse party or his attorney within three months after the award is filed or delivered. If the adverse party is a resident of the district within which the award was made, such service shall be made upon the adverse party or his attorney as prescribed by law for service of notice of motion in an action in the same court. If the adverse party shall be a nonresident then the notice of the application shall be served by the marshal of any district within which the adverse party may be found in like manner as other process of the court. For the purposes of the motion any judge who might make an order to stay the proceedings in an action brought in the same court may make an order, to be served with the notice of motion, staying the proceedings of the adverse party to enforce the award.

Opposition

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No. 81-716

Supreme Court of the United States

October Term, 1981

AMERICAN FEDERATION OF TELEVISION AND RADIO ARTISTS, CLEVELAND LOCAL, AFL-CIO,
Petitioner,

vs.

STORER BROADCASTING COMPANY,
Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

Whether the decision of the Court of Appeals, reversing the District Court for substituting its own interpretation of a collective bargaining agreement for that of an arbitrator, warrrants review by this Court, particularly where the standard of review of arbitral awards is uniform among the Circuits and where the challenged award draws its essence from the collective bargaining agreement.

LIST OF SUBSIDIARIES AND AFFILIATES

The Respondent, Storer Broadcasting Company, lists the following subsidiaries, affiliates and joint ventures pursuant to United States Supreme Court Rule 28.1:

ADR/CADRE, INC.

All State Cablevision, Inc.

At Home Entertainment, Inc.

Box Office Enterprises, Inc.

Camarillo Cable TV, Inc.

Camelback Cablevision, Inc.

Catoctin Cable Communications, Inc.

CATV Service Company

Chesterfield Cablevision, Inc.

Coastal Cable TV, Inc.

Collin County Communications, Inc.

Community Television Cable System of Lee County, Inc.

Connecticut River Cable TV Company, Inc.

Dade Cable Television, Inc.

East Rutherford Realty, Inc.

Fairfield County Cable Communications, Inc.

First Television Corporation

Futurevision Cable Enterprises, Inc.

Gateway Communications, Inc.

General Television, Inc.

General Television of Delaware, Inc.

General Television of Maryland, Inc.

General Television of Minnesota, Inc.

Gulfstream Cablevision, Inc.

Hollywood Cablevision (Joint Venture)
Houston Community Cablevision, Inc.
Howard Cable Television Associates, Inc.
The Meca Corporation
Mesa Community Cable Television, Inc.
Middlesex Cablevision, Inc.
Minority Broadcast Investment Corporation
Minority Broadcast Ventures Corporation
Monmouth Cablevision, Inc.
New Boston Television, Inc.
New England Microwave, Inc.
New Hope Cable TV, Inc.
Northern Cablevision, Inc.
Northern Cablevision of Minneapolis, Inc.
Northern Cablevision Northwest, Inc.
Northern Illinois Cablevision, Inc.
Northwest Philadelphia Cable Communications, Inc.
Philadelphia Community Cablevision, Inc.
Plainfield Cablevision, Inc.
Princeton Cablevision, Inc.
Redwood Cable Vision
Riverside Cable TV, Inc.
Roseville Cablevision, Inc.
Sanlando Cablevision, Inc.
Shore Television Company, Inc.
Storer Cable Communications of Arizona, Inc.
Storer Cable Communications of Arkansas, Inc.
Storer Communications of Bowling Green-Warren County, Inc.
Storer Cable Communications (Joint Venture)

Storer Cable Communications, Inc.
Storer Cable TV, Inc.
Storer Cable of Carolina, Inc.
Storer Communications of Clinton, Inc.
Storer Cable TV of Connecticut, Inc.
Storer Communications of Dallas, Inc.
Storer Communications of Erie, Inc.
Storer Cable TV of Florida, Inc.
Storer Cable in the Gables
Storer Communications of Fort Worth, Inc.
Storer Communications of Franklin, Inc.
Storer Communications of Gloucester County, Inc.
Storer Communications of Groton, Inc.
Storer Cablevision of Houston, Inc.
Storer Communications of Illinois, Inc.
Storer Communications of Jefferson County, Inc.
Storer Communications of La Porte, Inc.
Storer Cable Communications of Maryland, Inc.
Storer Metro Communications, Inc.
Storer Communications of Montgomery County, Inc.
Storer Communications of New Orleans, Inc.
Storer North Suburban Cable Communications, Inc.
Storer Communications of Northern Kentucky, Inc.
Storer Cable Communications of Pennsylvania, Inc.
Storer Communications of Portland, Inc.
Storer Cable Communications of Prince George's County, Inc.
Storer Cable Communications of Princeton, Inc.
Storer Programs, Inc.
Storer Radio, Inc.
Storer Cable TV of RADNOR, Inc.

Storer Riverfront Cable Communications, Inc.
Storer Cable Communications of Springfield, Inc.
Storer Television Sales, Inc.
Storer Cable Communications of Tennessee, Inc.
Storer Cable TV of Texas, Inc.
Storer Communications of Washington, Inc.
Sunset Cablevision, Inc.
Tampa Bay Cablevision, Inc.
Tarrant Cable Communications, Inc.
Trans County Cable Communications, Inc.
Washington Satellite Corporation
WITI-TV, Inc.
KCST-TV, Inc.
Radio WLAK, Inc.

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ON PETITION FOR A WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

I. STATEMENT OF THE CASE

On July 20, 1981, the Court of Appeals for the Sixth Circuit unanimously reversed the District Court's decision to remand the arbitration award at issue in the present case for further proceedings before the Arbitrator. The Sixth

Circuit subsequently entered judgment confirming the award.[1]

The Arbitrator had denied the grievance of James Cox (the "Grievant") who challenged his discharge by Respondent Storer Broadcasting Company ("Storer") as being "improper".[2] The Grievant was a member of a bargaining unit at Storer represented by the Petitioner, the American Federation of Television and Radio Artists ("AFTRA").

Upon receipt of the Arbitrator's unfavorable ruling upholding the discharge, AFTRA sought to vacate the Arbitrator's award in United States District Court for the Northern District of Ohio. Storer counterclaimed to have the award confirmed. On March 4, 1980, the District Court, disagreeing with the Arbitrator's interpretation of the "*Reasons for Termination*" clause within the collective bargaining agreement, remanded the case for further consideration by the Arbitrator in accordance with the Court's interpretation of that clause.

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1. The Opinion of the Court of Appeals for the Sixth Circuit is reproduced at page A1 in the Appendix attached to the Petition for Writ of Certiorari.

The Memorandum and Order of the United States District Court for the Northern District of Ohio, Eastern Division, is reproduced at pages A4 and A5 of the Appendix attached to the Petition for Writ of Certiorari.

The Opinion and Award of Arbitrator David Ralph Hertz is reproduced at pages A21 and A22 of the Appendix attached to the Petition for Writ of Certiorari.

All references to these opinions will be to the appropriate page of that Appendix.

2. To quote the Union's claim "[I]t is our [AFTRA's] determination that the discharge of Jim Cox was *improper*. Accordingly, we are filing this matter with the American Arbitration Association for arbitration in keeping with the contract agreement." Letter of July 7, 1977, to WJKW-TV's News Director (Virgil Dominic) from AFTRA's Executive Secretary (Kenneth A. Bichl) (Emphasis added).

Storer appealed the District Court's ruling and the Sixth Circuit unanimously reversed, ordering that the award be confirmed. AFTRA now seeks a Writ of Certiorari from this Court.

A. Proceedings Before the Arbitrator

Storer Broadcasting Company is an Ohio corporation which is the licensee of television station WJKW-TV in Cleveland, Ohio. AFTRA is a "labor organization" as defined in Section 2(5) of the National Labor Relations Act. 29 U.S.C. §152(5) (1976).

Storer and AFTRA are parties to a collective bargaining agreement (the "Agreement") covering "all Staff Announcers, Staff News Editors and Free Lance performers" at WJKW-TV. The Agreement's grievance procedure provides for binding arbitration as its third and final step. Discharge and termination of employment are subject to the arbitration provision.

A review of the factual setting which resulted in the Grievant's discharge is necessary to understand the Arbitrator's award and interpretation of the Agreement. The Grievant's discharge was precipitated by the events of May 26 and 27, 1977, but these events were merely the "straw that broke the camel's back" (A25), being the culmination of a history of transgressions spanning the Grievant's tenure.

The Grievant's ten (10) year service record was fairly described by the Arbitrator as "a speckled one" (A24), including impressive commendations by public officials and company supervisors, but also including numerous criticisms and reprimands by management, particularly during April and May of 1977. During this two (2) month period, the Grievant's tardiness, absenteeism, poor quality of work, missed deadlines and general unprofessionalism drew re-

peated warnings from Storer that the Grievant was placing his job in jeopardy.[3]

Finally, on May 26 and 27, 1977, while assigned to interview the mayor of a local municipality, the Grievant harassed a valuable news source, the Mayor's Secretary; repeatedly accused her of lying; verbally abused, to the point of tears, the municipality's switchboard operator; was involved in an altercation at the City Clerk's Office; and accused the Mayor's Office of "Gestapo" tactics in running the City.[4] All of this prompted numerous complaints to Storer about the Grievant's conduct.

Following the evening news on Friday, May 27, 1977, WJKW-TV's News Director confronted the Grievant with

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3. The following written memoranda were presented to the Grievant by WJKW-TV News Director Virgil Dominic:

1. April 11, 1977: Grievant's failure to report a significant news item cited as a "dereliction of duty." (Co. Ex. 11 in Arbitration);
2. April 25, 1977: "Unprofessionalism" cited, closing with "You must improve or face severe consequences." (Co. Ex. 13 in Arbitration;
3. May 4, 1977: Concern expressed over the Grievant's ability as a television reporter (Co. Ex. 20 in Arbitration);
4. May 5, 1977: Competence questioned, with warning that "[Y]ou have told me you're a good reporter. But your performance continues to cast doubt on your contention. You MUST do better work." (Co. Ex. 21 in Arbitration);
5. May 10, 1977: Specific statement outlining "This is what you must do if you are to keep your job here." (Co. Ex. 25 in Arbitration); and
6. May 26, 1977: . . . "Your work continues to fall short of the standards of performance we expect from reporters on this news staff." (Co. Ex. 31 in Arbitration).

Interspersed among these written correspondence were numerous verbal reprimands.

4. The Grievant denied these allegations. There was testimony before the Arbitrator by several City employees, including the Mayor, the Secretary and the switchboard operator, as well as the Grievant. The Arbitrator did not believe him and gave credence to the City employees' testimony (A26).

these complaints. Recognizing that the News Director intended to discharge him, the Grievant asked for the opportunity to resign, thereby remaining eligible for severance and termination benefits provided for in the Agreement. The News Director agreed to accept the Grievant's resignation.

Over the weekend, however, the Grievant reversed his position and withdrew his resignation. He was promptly discharged, effective May 27th. The Grievant was given severance pay and, at his request, his insurance was continued. Additionally, a contribution was made to the Pension Fund. The News Director offered him a letter of recommendation as a newspaper reporter (as opposed to a television reporter) and placed the facilities of the station at his disposal in his quest for new employment.

AFTRA filed a grievance regarding the discharge on May 31st in accordance with Section 9 of the Agreement and the parties, unable to resolve the dispute in the first and second steps of the grievance procedure, advanced to arbitration.

There was no submission agreement between the parties outlining the issue before the Arbitrator, but the Arbitrator recognized the issue as involving the matter of "just cause" for termination. He noted "[a]t the time of discharge, the Employer stated formally as the reason therefor: '. . . just and sufficient cause pursuant to Section 24(B) [sic] of WJKW-TV/AFTRA contract.'" (A23). The Arbitrator also noted, "The Brief of the Union addresses itself to the claim that the discharge was 'without just cause' because (a) the Employer failed to meet the burden of proof to sustain discharge; (b) the Employer failed to accord the grievant an adequate investigation or hearing; (c) the discharge was clearly excessive." (A23-A24).

Section 24(b) of the Agreement, the provision justifying the Grievant's discharge, provides:

> *Reasons for Termination.* The Company may terminate employment for insubordination, incompetence, misconduct, or any other just and sufficient cause, and *unsuitability for staff or program requirements.* (Emphasis added.)

It is this last "unsuitability clause" which is at the core of the present controversy. The Arbitrator, subsequent to the hearing on the merits and the filing of post-hearing briefs, requested that the parties address the relevance of the "unsuitability clause" to the facts before him.

Storer took the position in response to this request that the "unsuitability clause" sustains the termination of an employee on less rigorous and more "subjective" grounds than would be required for, say, misconduct, insubordination or incompetence. Storer noted that since the entire Agreement was before the Arbitrator, the testimony and evidence in the record warranted the Arbitrator finding that the Grievant's conduct certainly rendered him "unsuitable" to serve as a television reporter. Nonetheless, Storer urged that the Arbitrator find that the Grievant's conduct exceeded this "subjective" standard and rose to a level of "objective" misconduct.[5]

AFTRA disagreed that the "unsuitability clause" was relevant and asserted that termination for "unsuitability" was separate and apart from any termination for "just and sufficient cause", despite the fact that it was found in the *same sentence* in the Agreement. AFTRA, however, did not contend that consideration of "unsuit-

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5. *See* Company's Written Comments on Relevancy of "Unsuitability" Standards in Section 24(b) at A1 of the Appendix attached hereto.

ability" by the Arbitrator was beyond the scope of the submission by the parties or that consideration of "unsuitability", either alone or in connection with "just cause" exceeded the Arbitrator's authority. Moreover, AFTRA did not advance its own interpretation of the "unsuitability" provision.

The Arbitrator thereafter issued his Opinion and Award on May 22, 1978, holding:

> From the foregoing, it appears that the Employer has exhibited facts constituting reasons for termination of employment under Section 24(b) of [the Agreement] . . . .
>
> For these reasons the grievance is denied and award is made accordingly. (A30-A31.)

The Arbitrator's opinion makes it clear that he based his award upon a construction of *both* "just and sufficient cause" as well as "unsuitability." He does not rest his decision solely on "unsuitability" as erroneously asserted in AFTRA's Petition (Petition for Writ of Certiorari at 5).

AFTRA seizes upon two isolated passages within the Arbitrator's opinion to support its assertion that the Arbitrator exceeded the scope of submission.

The first passage, under the heading of "Discussion of the Facts", noted that although the formal reason for discharge was "just and sufficient cause", the News Director gratuitously offered assistance to the Grievant in his effort to find new employment as a *newspaper reporter*, thus indicating the News Director's basic belief in the Grievant's competence as a journalist while doubting his suitability as a television reporter. The Arbitrator concluded his statement of the facts by stating, "Thus, while the action was stated to be 'for just and sufficient cause', suitability

clearly played *a part* in concluding that termination was the appropriate action." (A29) (Emphasis added). "Unsuitability" was not the sole reason for termination as AFTRA has asserted, but it was clearly considered.

The second passage, under the heading of "The Contract Provisions", relates to the Arbitrator's view that Section 24(b) is to be considered as a whole, not a fragmented list of rationale justifying termination of any employee. It reads as follows:

> The language added [the "unsuitability clause" at the end of Section 24(b)] is significant in giving meaning to "insubordination, incompetency, misconduct or any other just or sufficient cause". It suggests that trifling insubordination, minor incompetency, venial misconduct in themselves do not warrant the extreme penalty of termination, but that they and "other just or sufficient cause" may be considered in assessing the extent of appropriate disciplinary action when related to "unsuitability" for the Employer's requirements.
>
> Hence, if the grievant had merely been abrasive in a manner concerning which the Employer could afford to be indifferent, his misconduct would not be sufficient to warrant discharge. Since, however, his conduct in this instance was sufficient to engender complaints by the Brook Park officials, his conduct could not be overlooked by the Employer. The Employer could not sit by idly after one of its sources of news had been antagonized by an employee.
>
> The fact that the grievant otherwise presented reasons to doubt his suitability for the job clearly led to termination rather than to *a less extreme form of discipline*. (A30) (Emphasis added).

Hence, the two passages relied upon by AFTRA to support its assertion that the Arbitrator exceeded the scope of submission are more appropriately viewed as (1) the Arbitrator's finding of fact regarding the Company's reasons for termination as expressed in the News Director's testimony and (2) the Arbitrator's interpretation of the ambiguous termination section, 24(b), drafted by the parties.

In essence, what the Arbitrator did was hold that misconduct which, under some circumstances, might not warrant discharge, will warrant discharge where it directly indicates an employee's lack of suitability in meeting staff requirements. Applying this to the case before him, he found the Grievant's conduct was clearly unacceptable and warranted discharge. Moreover, in upholding the discharge, the Arbitrator chose to interpret the "*Reasons for Termination*" section of the Agreement as a whole and it was this interpretation for which the parties had bargained.

B. Proceedings Before the District Court

Faced with this unfavorable ruling, AFTRA filed a complaint to vacate and modify the award in the United States District Court for the Northern District of Ohio, Eastern Division, on December 1, 1978. Jurisdiction was alleged pursuant to the United States Arbitration Act, 9 U.S.C. §§10, 11 and 12 (1976), and Section 301 of the Labor Management Relations (Taft-Hartley) Act, 29 U.S.C. §185 (1976). Storer answered the Complaint and counterclaimed to have the Arbitrator's award confirmed under Section 9 of the Arbitration Act, 9 U.S.C. §9 (1976). Each party filed a motion for summary judgment, there existing no genuine issue of material fact, and on March 4, 1980, the Court remanded the action to the Arbitrator to make a specific finding of whether the Grievant was discharged for "incompetence, misconduct, or any other just or sufficient cause" (A20).

During the course of its Memorandum, the District Court indicated its dissatisfaction with the Arbitrator's construction of the "unsuitability clause" in *pari materia* with the rest of the *"Reasons for Termination"* clause. The Court, thereafter, substituted its own interpretation of Section 24(b) stating that "the 'unsuitability' clause must be applied independently of the 'just and sufficient cause' ground". The Court bolstered its interpretation with several arbitration opinions involving different parties than those hereto and held that its interpretation was "the plain and unambiguous meaning of the 'unsuitability' clause which Arbitrator Hertz was 'without authority to disregard or modify' . . . ." (A19-20) (citing *Detroit Coil Co. v. International Association of Machinists & Aerospace Workers, Lodge No. 82,* 594 F.2d 575, 579 (6th Cir.), *cert. denied,* 444 U.S. 840 (1979)). Given the Court's own interpretation, it naturally followed that there was no evidence in the record for the Arbitrator to consider regarding "unsuitability" since neither party addressed this "independent" ground (A19).

Storer filed a Notice of Appeal from the District Court's adverse judgment on April 2, 1980.

C. Proceedings Before the Court of Appeals

On July 20, 1981, the Court of Appeals for the Sixth Circuit unanimously reversed the District Court in a concise *per curiam* opinion. Recognizing that the termination provision of the Agreement, including the "unsuitability clause", was ambiguous, the Court properly stated that "[o]ne of the strongest principles of labor/management law . . . is that the arbitrator is charged not only with deciding disputes of fact, he is also charged with interpreting the labor/management contract. *United Steelworkers of*

America v. Enterprise Wheel & Car Corp., 363 U.S. 593 (1960); . . . ." (A3). Clearly, it was the Arbitrator's findings and interpretation that were bargained for, not the District Court's.

The Court of Appeals then went on to apply *Enterprise Wheel* to the case at bar and found that the Arbitrator's award did, in fact, "draw its essence" from the Agreement (A3).

It is from this unanimous decision that AFTRA now seeks a Writ of Certiorari.

II. SUMMARY OF ARGUMENT

The Court of Appeals for the Sixth Circuit based its decision on the universally accepted criteria for review of arbitration awards first enunciated in *Enterprise Wheel* and since applied throughout the Circuits.

Regarding the Sixth Circuit's application of these criteria to the case at bar, no conflict exists with *Enterprise Wheel;* no conflict exists with Third Circuit decisions; and no conflict exists among any other Sixth Circuit decisions.

The Arbitrator's award drew its essence from the Collective Bargaining Agreement and it was within the scope of submission. Thus, the Sixth Circuit properly corrected the erroneous decision of the District Court and returned the parties to the position for which they had bargained.

III. REASONS FOR DENYING CERTIORARI

In the twenty years since the *Steelworkers Trilogy*[6] was decided, arbitration has continued to be considered the "linchpin" of labor/management relations. One of the essential principles in elevating arbitration to its present favored status is that where it "is the arbitrator's construction which was bargained for; and so far as the arbitrator's decision concerns construction of the contract, the courts have no business overruling him because their interpretation of the contract is different from his." *United Steelworkers of America v. Enterprise Wheel & Car Corp.*, 363 U.S. 593, 599 (1960).

In the case at bar, AFTRA's interpretation, and similarly that of the District Court, clearly disagrees with the construction of the Arbitrator. This alone, however, has never warranted judicial relief.

Perhaps recognizing this fact, AFTRA cites application of three (3) exceptions to the "judicial deference doctrine" regarding arbitration awards. AFTRA alleges: first, the Arbitrator's award exceeded the scope of submission; second, there was no evidentiary support in the record for his determination; and third, the Arbitrator modified the plain and unambiguous language of the Agreement (Petition for Writ of Certiorari at 12). AFTRA then meshes these exceptions, which speak to the merits, with further allegations of conflict among the Circuits and conflict with this Court's holding in *Enterprise Wheel*. None of these allegations are well taken and none warrant the granting of a Writ of Certiorari.

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6. *United Steelworkers of America v. Enterprise Wheel & Car Corp.*, 363 U.S. 593 (1960); *United Steelworkers of America v. Warrior & Gulf Navigation Co.*, 363 U.S. 574 (1960); *United Steelworkers of America v. American Manufacturing Co.*, 363 U.S. 564 (1960).

A. No Conflict Exists With Enterprise Wheel

1. The arbitrator's award "draws its essence" from the collective bargaining agreement

Judicial deference to an arbitrator's award must be granted if the award "draws its essence from the collective bargaining agreement." 363 U.S. at 597. This test, first presented in *Enterprise Wheel*, was applied by the Court of Appeals for the Sixth Circuit and the Court properly found that the award did "draw its essence" from the Agreement (A3).

AFTRA recognizes the Sixth Circuit's application of *Enterprise Wheel* (Petition for Writ of Certiorari at 12), yet baldly asserts a violation of its principles, thus resulting in a blatant attempt to create conflict where none exists.

2. The arbitrator's decision was within the scope of submission

The *Steelworkers Trilogy* also established a broad presumption of arbitrability where a clause in a collective bargaining agreement is the subject of a dispute. *See United Steelworkers of America v. Warrior & Gulf Navigation Co.*, 363 U.S. 574 (1960); *United Steelworkers of America v. American Manufacturing Co.*, 363 U.S. 564 (1960).

The arbitration and grievance provisions in the present Agreement are extremely broad. A "grievance" is defined as "a conflict, dispute or question between AFTRA or an Artist, and the Company as to the interpretation, application or performance of this Agreement."[7] Further, if "any grievance is not settled within thirty-five (35) days from the date of the first meeting, it may be arbitrated . . ., upon the written request of any party".[8]

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7. *See* Section 9(a) of the Agreement.
8. *See* Section 9(e) of the Agreement.

The dispute submitted to arbitration was the propriety of the discharge of the Grievant. There was no submission agreement between the parties, hence it was up to the Arbitrator to frame the issue. During the course of his decision, the Arbitrator correctly applied Section 24(b) of the Agreement, entitled *"Reasons for Termination"*, and found that the "Employer [had] exhibited facts constituting reasons for termination of employment. . ." under that section (A30). The discharge of the Grievant was the only issue decided, and the *"Reasons for Termination"* provision was the only contract clause construed in reaching that decision. Thus, "[i]t is *not apparent* he went beyond the submission." 363 U.S. at 598 (Emphasis added). If anything, the Arbitrator strictly confined his award to the issue presented and its resolution under the relevant contract provision.

In sum, AFTRA has failed to show that the Court of Appeals has disregarded the criteria and submission exception introduced in *Enterprise Wheel.*

B. No Conflict Exists Between Circuits

1. The Third Circuit is in accord with the Sixth Circuit regarding judicial review of arbitral awards

AFTRA continues its attack on the Sixth Circuit's decision by asserting application of two other exceptions to the "judicial deference doctrine", *i.e.*, the award is unsupported by the record and the award substantially changes the plain, unambiguous meaning of the *"Reasons For Termination"* clause.

Interestingly, the Sixth Circuit has recently recognized both of these exceptions in a case involving the same parties hereto. In *Storer Broadcasting Co. v. AFTRA,* 600 F.2d

45, 47 (6th Cir. 1979) (hereafter "*Storer I*"), the Court stated in vacating an arbitral award:

> It is very well settled that the courts are generally required to refrain from reviewing the merits of an arbitrator's award due to the policy favoring arbitration as a means of resolving labor disputes. This was established in the *Steelworkers Trilogy* and has been applied numerous times by this court. But there are at least two important exceptions to this general rule. First, "the arbitrator is confined to the interpretation and application of the collective bargaining agreement, and although he may construe ambiguous contract language, he is without authority to disregard or modify plain and unambiguous provisions." *Detroit Coil Co. v. Int'l Ass'n of Machinists*, 594 F.2d 575, 579 (6th Cir. 1979), *citing cases*. Thus, the courts are empowered to set aside an award if the arbitrator exceeds these confines. Second, "although a court is precluded from overturning an award for errors in the determination of factual issues, '[n]evertheless, if an examination of the record before the arbitrator reveals no support whatever for his determinations, his award must be vacated.'" *Id.* at 580-81, *citing N F & M Corp. v. United Steelworkers of America*, 524 F.2d 756, 760 (3d Cir. 1975). *See also Timken Co. v. Local Union No. 1123, United Steelworkers of America*, 482 F.2d 1012, 1014-15 (6th Cir. 1973).

Significantly, the Sixth Circuit in *Detroit Coil Co. v. International Association of Machinists & Aerospace Workers, Lodge No. 82*, 594 F.2d 575, 580 (6th Cir.), *cert. denied*, 444 U.S. 840 (1979), cited above, relied upon a Third Circuit decision, *N F & M Corp. v. United Steelworkers of America*, 524 F.2d 756, 760 (3d Cir. 1975), as authority for its holding. In fact, *N F & M Corp.*, factually similar to

Detroit Coil in that they both involve timeliness under the contractual grievance procedure, supports both of the exceptions outlined in *Storer I*. Furthermore, the Third and Sixth Circuits have continued to apply the criteria outlined in *Storer I*, including these exceptions. *See International Brotherhood of Firemen and Oilers, Local No. 935-B v. Nestle Co.*, 630 F.2d 474 (6th Cir. 1980) (Award vacated where arbitrator interpreted "shall" as "may" in a discharge context); *Johnson Bronze Co. v. U.A.W.*, 621 F.2d 81 (3d Cir. 1980) (District Court reversed for substituting its own interpretation of a layoff provision for that by the arbitrator); *Falstaff Brewing Corp. v. Local No. 153, International Brotherhood of Teamsters*, 479 F. Supp. 850 (D.N.J. 1978), *aff'd*, 609 F.2d 501 (3d Cir. 1979) (*per curiam*), *cert. denied*, 444 U.S. 1079 (1980) (Award confirmed where attacked as exceeding scope of submission). Thus, it is clear from even a cursory review of the recent decisions in the Third and Sixth Circuits that the standard of review of arbitral awards applied by these courts is substantially identical. Any difference in result from case to case is based primarily on the facts, not on deviations in the standard applied.

AFTRA primarily relies on a Third Circuit case, decided in 1969, as the basis of its claim that a conflict exists among Circuits (Petition for Writ of Certiorari at 14). In *Amalgamated Food & Allied Workers Union, Local 56 v. Great Atlantic & Pacific Tea Co.*, 415 F.2d 185 (3d Cir. 1969), the Third Circuit affirmed a District Court order vacating an award that dismissed a Union grievance challenging the discharge of a thirty-two (32) year employee for allegedly stealing four (4) cans of crab meat. The impartial arbitrator, serving with one Company and one Union representative, refused to make a factual finding on the theft. Instead, the arbitrator ruled that a Union

letter challenging the severity of discipline constituted confession to the theft, and thereby removed the theft issue from arbitration. The District Court vacated the award because the arbitrator never made a decision as to whether the grievant was discharged for "just cause", the issue submitted. Also, the District Court held that the arbitrator's conclusion that the Union letter constituted a confession denied the grievant due process. Based on these facts, the Third Circuit affirmed.

AFTRA factually analogizes this Third Circuit case to the case at bar, but they are clearly dissimilar. In the present case, a specific award denying a narrowly drawn grievance was rendered. This was not done in the Third Circuit case. In the present case, denials of "industrial due process" do not abound. They do abound in the Third Circuit case. Finally, even though a contrary result is reached in these cases, this is due to the factual circumstances, not the legal standards applied by each Court which are and were substantially the same.

In sum, the asserted conflict between the Third and Sixth Circuits does not exist.

2. The decisions within the Sixth Circuit are consistent

Storer Broadcasting Co. v. AFTRA (Storer I), 600 F.2d 45 (6th Cir. 1979), quoted above, represents the clearest restatement of the standards applied for the past fifteen (15) years by the Sixth Circuit pertaining to review of arbitral awards.

Beginning with *United Steelworkers of America v. Caster Mold & Machine Co.*, 345 F.2d 429 (6th Cir. 1965), wherein the Court confirmed an award attacked as beyond the scope of submission, the Sixth Circuit has continued

to show deference to awards that "draw their essence" from the collective bargaining agreement.

Two years after *Caster Mold*, in a case analogous to the case at bar, the Court reversed the District Court for substituting its own interpretation of the collective bargaining agreement for that of the arbitrator. In *Kroger Co. v. International Brotherhood of Teamsters*, 380 F.2d 728 (6th Cir. 1967), the employer challenged an award granting backpay and retroactive reinstatement in a profit sharing plan as beyond the scope of submission. Noting, as here, that the parties did not stipulate to a statement of the issue before the arbitrator and that this contributed to the confusion, the Court, prior to criticizing the parties on their inability to agree, stated: "The fact that the arbitrator's opinion, accompanying his award, is ambiguous is not reason for refusing to enforce the award." *Id.* at 730. Together, these two cases clearly state the general rule.

In 1973, the Court considered the first of three (3) cases in which arbitration awards did not "draw their essence" from the collective bargaining agreement. In *Timken Co. v. Local Union No. 1123, United Steelworkers of America*, 482 F.2d 1012 (6th Cir. 1973), the grievant was discharged when he was incarcerated for numerous traffic violations. The Employer applied the contract's "voluntary quit" clause in discharging the grievant finding his absence, in excess of seven (7) days, was unauthorized. The arbitrator totally disregarded the "unauthorized absence" provision within the "voluntary quit" clause and reinstated the grievant. The District Court vacated the award and the Sixth Circuit affirmed, holding that the arbitrator exceeded his authority in not applying the unambiguous "voluntary quit" clause.

In the last two pre-*Storer I* cases, the Court also found that the arbitrator's awards failed to "draw their essence"

from the agreements because unambiguous contractual language was ignored. In *Detroit Coil Co. v. International Association of Machinists & Aerospace Workers, Lodge No. 82*, 594 F.2d 575 (6th Cir.), *cert. denied*, 444 U.S. 840 (1979), cited above, an award upholding a grievance, in spite of its challenged untimeliness, was vacated. The relevant contract provision required notice of arbitration by the grieving party to the other party within eight (8) days after the conclusion of the preceding step. Failure to meet the "eight day" requirement constituted mandatory settlement. The arbitrator ruled the "eight day" provision was inapplicable, but the Sixth Circuit disagreed and vacated the award because of the plain, unambiguous nature of the language at issue. In *General Drivers, Warehousemen & Helpers, Local 89 v. Hays & Nicoulin, Inc.*, 594 F.2d 1093 (6th Cir. 1979) (*per curiam*), the Court likewise vacated an award which ignored a contract provision stating, "The [company] shall be the *sole* judge of the qualifications, capability, number, purpose and tenure of the employees." (Emphasis added). In both of these cases, the Court of Appeals held the contractual language was unambiguous and required application.

There has been one reported Sixth Circuit decision subsequent to *Storer I*, other than the case at bar. In *International Brotherhood of Firemen & Oilers, Local 935-B v. Nestle Co., Inc.*, 630 F.2d 474 (6th Cir. 1980), the Court reaffirmed its position and vacated an award reinstating a discharged grievant where the contract provided: "[I]nsubordination . . . *shall* constitute cause for dismissal of any employee . . . ." (Emphasis added). The arbitrator's award had, in effect, ignored the mandatory word "shall".

This lengthy analysis indicates the standard of review in the Sixth Circuit has remained constant for the past

fifteen (15) years: An arbitrator's award will be confirmed if it "draws its essence" from the collective bargaining agreement. Thus, if the arbitrator interprets an *ambiguous* provision within the contract, his interpretation will stand, as this is what the parties bargained for. However, where the contract provision is *unambiguous*, the arbitrator must follow the plain meaning intended by the parties.

In the present case, the Court of Appeals found the *"Reasons for Termination"* clause ambiguous (A3). As such, it was the Arbitrator's interpretation that was bargained for, not the District Court's. The Court of Appeals did not enunciate a new standard. It applied the same standard it has used for the past fifteen years, including the exceptions relied upon by AFTRA, and confirmed the arbitrator's decision. Any assertion of inconsistency by the Sixth Circuit is simply not well taken.

IV. CONCLUSION

AFTRA would have this Court re-examine its holding in *Enterprise Wheel* to further delineate the standards of judicial review of arbitral awards (Petition for Writ of Certiorari at 19). Storer respectfully asserts that any re-examination is unnecessary and unwarranted.

Enterprise Wheel, decided some twenty years ago, established a general rule that deference should be shown to arbitral awards. The "essence test", universally applied throughout the Circuits, has been the touchstone of this deference rule. The test requires no clarification. The judicially created "exceptions" to the deference rule are merely applications of the "essence test".

The Court of Appeals for the Sixth Circuit applied all of these rules to the case at bar. It found that the Arbi-

trator's award did "draw its essence" from the Collective Bargaining Agreement; that it was the Arbitrator's interpretation for which the parties had bargained; and that the Award required judicial deference.

The re-litigation of this dispute cannot be justified. No conflict exists among the Circuits or with any prior decisions of this Court. Therefore, the Respondent, Storer Broadcasting Company, respectfully asks that the Petition for Writ of Certiorari be denied.

Respectfully submitted,

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APPENDIX

COMPANY'S WRITTEN COMMENTS ON RELEVANCY OF "UNSUITABILITY" STANDARDS IN SECTION 24(b)

Case No. 53 30 0261 77

AMERICAN ARBITRATION ASSOCIATION
VOLUNTARY LABOR ARBITRATION TRIBUNAL

AMERICAN FEDERATION OF TELEVISION AND RADIO ARTISTS

and

STORER BROADCASTING COMPANY (WJKW-TV)

DAVID R. HERTZ, ESQ., *Arbitrator*

COMPANY'S WRITTEN COMMENTS ON RELEVANCY OF "UNSUITABILITY" STANDARDS IN SECTION 24(b)

The Arbitrator's May 1, 1978 letter inquired as to the relevancy of the "unsuitability for staff or program requirements" phrase in Section 24(b) of the Collective Bargaining Agreement.

As the Arbitrator knows, the Company did not specifically rely upon that ground in terminating the employment of Mr. Cox. As can be seen from Company Exhibit 6 as well as pages 28 to 32 of the Company's Post-Hearing Brief, Grievant's employment was terminated for "just and sufficient cause", i.e., misconduct. The Company believes that the actions of Mr. Cox on May 26 and May 27, 1977 were far more serious than mere "unsuitability" and

hence the Company chose to so characterize the reasons for termination.

Nevertheless, the Company believes that the "unsuitability" standard is relevant because the Arbitrator has the authority, under the Contract, to determine whether the Company's termination of Mr. Cox can be justified based upon other provisions of Section 24(b) not specifically relied upon by the Company. This is because the entire Contract is before the Arbitrator in this matter as well as all the facts regarding the Grievant's job performance both on the two days in question which gave rise to his discharge as well as his earlier performance which had been reviewed unfavorably by Virgil Dominic. The Arbitrator has the authority under the Contract to apply the contractual language (any or all of it) to the fact situation placed before him. This would naturally include applying the "unsuitability" phrase to the facts of Mr. Cox's conduct placed before him in evidence.

Obviously, from the context of paragraph 24(b), the parties did not intend "unsuitability" to meet the otherwise rigorous standard of "just or sufficient cause". It is quite possible, for example, for an employee to be unsuitable for staff or program requirements without necessarily having engaged in acts of insubordination, incompetency, misconduct or other "just or sufficient cause." The dichotomy at work here was examined in some detail in the arbitrator's own decision in *WFMJ Broadcasting Company*, 52 LA 995 wherein the arbitrator spoke of objective versus subjective considerations, the latter being uniquely applicable to broadcasting. The Company believes that the unsuitability portion of Section 24(b) would fall within this subjective area.

Applying that rationale to the instant case, for example, the Arbitrator might disagree with the Company's

characterization of the actions of Mr. Cox on May 26 and 27 as constituting "misconduct" *per se* under the Contract, yet conclude that the conduct of Mr. Cox on those dates, as well as earlier, was sufficient to render him "unsuitable" for the staff and program requirements of the Company's News Department established by Mr. Dominic, and hence sustain the termination of Mr. Cox on the less rigorous subjective grounds of "unsuitability" rather than the objective grounds of "misconduct."

Accordingly, while the Company continues to contend that Mr. Cox was justifiably terminated for just cause (as argued at length in its post-hearing brief and reply brief), it also believes that the actions of Mr. Cox at issue in the captioned case would warrant a conclusion by the Arbitrator that Mr. Cox was "unsuitable" for the news staff program requirements imposed by Mr. Dominic.

Wholly apart from the events of May 26 and 27 regarding Brook Park, the record in this case demonstrates a basic incompatibility between Virgil Dominic's requirements for successful broadcast journalism and Grievant's journalistic skills acquired chiefly as a newspaper reporter, an incompatibility which the Company submits rendered Grievant unsuitable under the terms of Section 24(b). In support of this, consider the following specific criticisms of Grievant contained in Mr. Dominic's memorandums:

(1) *April 11, 1977*: "I can't believe how you let 5 and 3 beat us on the Steele verdict tonight . . . It's now 30 minutes after 5 crawled the verdict on the screen and I still haven't heard from my reporter on the scene . . . YOU.

I dislike intensely having to get the information for our news audience from the competition. That is what I'm paying you for." (Company Exhibit 11)

(2) *April 25, 1977*: "I cannot tell you how disappointed I am in the story you prepared on the vote to rescind the pay raise formula for Cleveland Safety Forces. It was slanted heavily in favor of those who want that pay raise defeated. You had no interviews whatsoever with policemen and firemen who want the pay raise retained. You had plenty of time to do this story and plenty of instruction. . . . Reporting is far too serious a matter for the bias (intentional or not) and the unprofessionalism you displayed in handling this story. You must improve or face severe consequences". (Company Exhibit 13)

(3) *May 5, 1977*: "I was very disappointed on your story on the convention center at 6 p.m. tonight. Your story was essentially the same information that the Plain Dealer ran on the front page this morning. This is particularly disturbing since for the past week, I have pulled you off the other assignments so that you could devote your full reporting efforts to the Convention Center situation. . . . Yesterday, you called all excited about information you had turned up relative to a Council committee going to visit Cincinnati and Detroit to inspect convention facilities there. You acted as if you had discovered 'big news'. It saddened me to have to tell you that your new information had already been in the paper that morning. Don't you read the newspaper??? Every reporter has to read in order to do his job properly.

Jim, you have told me you are a good reporter. But your performance continues to cast doubt on your contention. You MUST do better work." (Company Exhibit 21)

(4) *May 10, 1977*: "*Your problem is that you think and write like a newspaper reporter.* This is understandable since your background is in newspaper work, but *my problem is that I need television reporters, not newspaper reporters.* . . . It has been my observation that you approach each story by talking to a lot of officials; by looking at logs and records and making copies of those records; by gathering a lot of statistics and background information. This is fine stuff for a long, indepth newspaper article, but we are not in the newspaper business.

What you need to do if you are to succeed as a television reporter is develop the ability to get to the gut issue of a story and tell that main part of any given story from a human standpoint so that it becomes meaningful and interesting to our television audience.

This is what you must do if you are to keep your job here.

I have encouraged you to come to me for advice and instruction on how to handle your stories. In my opinion, you have not taken advantage of this opportunity often enough . . ." (Company Exhibit 25). (Emphasis added.)

(5) *May 26, 1977*: "You continue to have a problem with the basic work skill of writing copy to match the sound bites you pull off for your stories. An example: last night on the 6 PM show you did the story on the Federal investigation into car rentals at the airport. . . . Now, let's see what you've done. First, you've told us that there may be a firm basis for the investigation into price fix-

> ing: ('prices . . . resemble a photo finish at Thistledown . . .') Then, in the very next breath, you turn the story around 180 degrees. ('It would be difficult to prove price fixing . . .') Then, in the next instant, you turn it around 180 degrees again . . . by running a sound bite of a person saying that the car firms charge the same prices.
>
> By that time, you have so confused the story that no one knows what it's about.
>
> Your work continues to fall short of the standards of performance we expect from reporters on this news staff." (Company Exhibit 31)

The Company submits that the foregoing excerpts represent specific and valid criticisms of Grievant's performance as a broadcast journalist compared to the standards established by Mr. Dominic.[1] A newspaper editor might not agree with the criticisms; a magazine editor might not agree; another T.V. news director might not agree; the Union and the Grievant obviously do not agree. But none of these have the right to establish the staff and program requirements for the news department at WJKW-TV. The Company hired Virgil Dominic to do that and it submits that it would clearly be an abuse of the Arbitrator's discretion to substitute the judgment of some third party for the judgment of the man whom the Company has hired to be responsible for such determinations.

The fact that Mr. Dominic was not pleased with Grievant's reporting style does not necessarily reflect adversely on Mr. Cox and it most certainly does not "ruin" the

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1. It is worthy of note, in passing, that the Union has never suggested that Mr. Dominic failed to impose these same standards on all other members of the news staff.

"promising career" of Mr. Cox in his "chosen field." The fact that Grievant's abrasive, newspaper-oriented reporting style rendered him unsuitable for WJKW's news department does not necessarily render him unsuitable for other T.V. news departments or other positions in broadcast journalism. As this Arbitrator observed in *WFMJ*, *supra*, such subjective determinations are part of the broadcasting industry in general:

> Apparently, however, the nature of this industry required provision for a second contingency—one in which . . . the Employer finds it necessary to relieve him from duty in the interest of the enterprise. . . .
>
> For such cases, the contract specifically reserves to the Employer the right to make the determination required; subject, however, to the implied condition that the employer must act in good faith.
>
> The evidence here . . . fails to show absence of good faith.
>
> Hence there is no reason to deny to the Employer a right which is reserved to him in the contract specifically.
>
> Fairness to the Grievant, however, requires that it be made entirely clear that this is not a case of discharge for cause . . . Those who may for any reason become concerned with his employment record are assured that his termination of employment at Station WFMJ is no reflection upon him.

Accordingly, the Company believes, for the reasons discussed above, that Grievant's performance as a news reporter for Mr. Dominic combined with Grievant's Brook Park actions on May 26 and May 27, warrant a conclusion by the Arbitrator that Grievant has demonstrated his un-

suitability for the requirements of the Company's news staff.

Respectfully submitted,

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